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No. _____

In The

Supreme Court of the United States

STATE OF NEW YORK,

Petitioner,

-against-

ANGEL L. MATEO,

Respondent,

ELIOT L. SPITZER, as Attorney General of New York,

Intervenor-Petitioner.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is unconstitutional for a state law to permit a defendant who is facing the death penalty to plead guilty and be assured a prison sentence instead.

PARTIES TO THE PROCEEDING

The petitioner is the State of New York

The respondent is Angel L. Mateo

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CITATIONS TO THE PROCEEDINGS BELOW

The New York Court of Appeals, in a so far unreported opinion annexed to this petition as Appendix A, modified respondent's conviction for murder in the first degree by setting aside the death sentence.

The court held the imposition of a death sentence to be a violation of the United States Constitution under its reading of *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 2d 138 (1968), in an interlocutory appeal by the prosecutors in this and a companion case. *Matter of Hynes v. Tomei, Matter of Relin v. O'Connell*, 92 N.Y.2d 613, 684 N.Y.S.2d 177 (1998), *cert. denied*, 527 U.S. 1015, 119 S.Ct. 2359, 144 L.Ed.2d 254 (1999), reproduced as Appendix B, *rev'g Matter of Relin v. Connell*, 251 A.D.2d 1041, 674 N.Y.S.2d 192 (4th Dept. 1998), reproduced as Appendix C. The court questioned whether *Jackson* was still good law, but determined that it was bound by that precedent to excise two provisions of the state's Criminal Procedure Law, which permitted defendants to plead guilty and thereby avoid the death penalty, as imposing a "chilling effect" on the "constitutional rights to maintain innocence and demand a jury trial." A. 100, 104. As this Court had done in *Jackson*, it set aside the death sentence in the case before it. A. 11.

The Court of Appeals also held, in an earlier opinion unrelated to these issues, that respondent was not chargeable as a serial murderer under a substantive section of the New York Penal Law. *People v. Mateo*, 93 N.Y.2d 327, 690 N.Y.S.2d 527 (1999), *aff'g*, 175 Misc.2d 192, 664 N.Y.S.2d 981 (1997).

JURISDICTIONAL STATEMENT

The final decision of the Court of Appeals was entered February 24, 2004. This petition is being filed within 90 days thereof. This Court has jurisdiction under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Five:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

Amendment Six:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . .

STATUTES INVOLVED

New York Criminal Procedure Law §§220.10(5)(e)(governing plea to an indictment), 220.30(3)(b)(vii)(governing a plea to part of an indictment or to cover another indictment):

> A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the Class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

STATEMENT OF THE CASE

Petitioner, New York State, seeks a writ of certiorari to review a decision of its highest court, the Court of Appeals, modifying the conviction of respondent Angel L. Mateo by setting aside the death sentence imposed by the jury for one of the twelve counts upon which he was convicted.

A. The Crime

As set out in greater detail in the appended opinion, the murder for which respondent received this sentence was part of a month-long crime spree during 1996, precipitated by an obsession to find and reconcile with his estranged girlfriend, Janette Sanchez, whom he had repeatedly abused and who took refuge in a battered women's shelter. He was assisted in this quest by his wife, Monica Szlekovics, and his younger brother, Victor Cordero.

On October 11, 1996, Mateo and Szlekovics forced their way into the apartment of Sanchez's sister and took her family hostage at gunpoint, threatening to kill them, and at one point striking the sister's four-year-old daughter with his handgun, until a meeting was arranged between him and Sanchez. This resulted in a brief reconciliation, but Sanchez returned to the shelter when Mateo pointed a gun at and threatened to kill her if he ever found that she was intimate with anyone else.

On November 2, Mateo, accompanied by Szlekovics and Cordero, was driving through the streets of Rochester in his quest to find Sanchez and, as he later told the police, "hurt anybody that got in his way." One person who did was Juan Rodriguez-Matos, a young man who, Mateo suspected, knew a woman who might know where Sanchez was hiding. When Matos, who was mentally impaired, was slow to provide that information, Mateo took him, at gunpoint, to Mateo's home for further interrogation.

Matos eventually answered Mateo's questions, but by then Mateo had decided to kill him. As he later told police, Mateo took Matos to the basement, tied a handkerchief over his eyes and "shot the dude in the left side of his head as he stood there." Although the shot was ultimately fatal, Matos continued to breath for a while and make "sucking noises" that interfered with the three kidnappers' "partying." Mateo accordingly put a plastic bag over Matos's head and, after the celebration and a nap, led his wife and brother to an empty lot where they dumped the body.

The execution of Matos did not bring Mateo any closer to Sanchez. A few days later, he, along with Szlekovics and Cordero, returned to Sanchez's sister's apartment building in the hope that she would show up there. Frustrated at having to wait in the basement, he led the others into taking over a neighbor's apartment at gunpoint. In the course of that home invasion, Mateo slashed the throat of and shot the man who lived there, nearly killing him. Szlekovics' gun malfunctioned when she aimed at the man's five-year-old son.

Mateo was arrested for that incident. In a self-induced expectation that it would lead to the release of other family members, he confessed to four murders, including Matos's.

B. The Proceedings To Date

Respondent was indicted on December 19, 1996, under a 1995 statute that elevated an intentional killing during the course of and in furtherance of a kidnaping to murder in the first degree and authorized the jury to impose a sentence of death. N.Y. Penal Law §125.27(1)(a)(vii). On August 25, 1997, the trial court, in response to a timely defense motion, held that the sentencing scheme was unconstitutional under *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed 138 (1968), because sections of the State Criminal Procedure Law enacted

at the same time as the death penalty permitted a defendant to plead guilty "with the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment." N.Y.Crim.Pro.Law §§220.10(5)(e), 220.30(3)(b)(vii). On June 10, 1998, the Appellate Division of the State Supreme Court, in response to an application by the prosecutor for collateral relief, rendered a declaratory judgment that the statutes were constitutional. A. 106-07.

On December 22, 1998, shortly after the verdict, the New York Court of Appeals reversed the declaratory judgment, holding that the Criminal Procedure Law did violate *Jackson* by "needlessly encouraging" guilty pleas. The court reasoned that the statutory authorization for a prison sentence in return for a guilty plea, like the Federal Kidnapping Act, imposed an "impermissible burden" on the exercise of the right against self-incrimination and the right to trial. A. 90-104.

The court rejected the argument that *Jackson* was no longer viable in light of this Court's subsequent legitimization of plea bargaining and the differences between the law struck down in 1968 and the present procedure, in New York and elsewhere, that bifurcates the guilt and sentencing phases and requiring judges and prosecutors to approve pleas. Although

> aware that the Supreme Court has not revisited *Jackson* and its progeny in 20 years, and that these cases might be decided differently today in light of the increased significance of plea bargaining and substantial changes in the administration of capital punishment,

the court found *Jackson* was still "controlling" and that it was "bound under the Federal Constitution to follow" it. A. 104.

In the meantime, the parties never actively engaged in plea negotiations. The prosecutor informed the trial court at

one point that there had been "no plea offer," and Mateo interjected, "Ain't nobody taking it." After the verdict, the jury determined, in a separate proceeding, that the underlying kidnaping of Juan Matos, the only aggravating factor that it was permitted to consider, substantially outweighed the mitigating evidence offered by the defense and that a death sentence was warranted. N.Y.Crim.Pro.Law §400.27.

On a direct appeal to the New York Court of Appeals, the court affirmed the conviction but set aside that sentence under its interlocutory ruling that the statutory authority for a prison sentence if Mateo had pleaded guilty plea wrongfully "burdened" the Fifth and Sixth Amendment rights that he exercised by going to trial. A. 11.

REASON FOR GRANTING THE WRIT

Respondent Angel Mateo was convicted and sentenced to death by a jury for committing an execution-style murder to which he spontaneously confessed. The sentence was set aside by the New York State Court of Appeals because and only because respondent "could have" offered to plead guilty, which he did not; and had the prosecutor accepted that offer, which he made it clear he would not; respondent would have been sentenced to life imprisonment instead. The state court reasoned that under *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed 2d 138 (1968) the statutory authorization for such a plea bargain imposed an "impermissible burden" on respondent's exercise of his Fifth and Sixth Amendment rights. A. 10-11. Although it recognized that if this court "revisited" *Jackson*, the question "might be decided differently today in light of the increased significance of plea bargaining and substantial changes in the administration of capital punishment," the court found itself constrained to follow the 1968 precedent. A. 104. New York now asks this court to

accept the invitation to revisit *Jackson*, and to recognize that it has not stood the test of time. Rigid adherence to the letter of that decision, at best, requires states to enact statutes that ignore modern reality by creating the fiction that a defendant facing the death penalty cannot plea bargain for the certainty of a lesser sentence. At worst, in states like New York, the "solution" involves the imposition of deadlines and other artificial constraints on plea negotiations that aggravate the very pressure to plead that the *Jackson* court sought to relieve.

The premise of *Jackson* was that the Federal Kidnaping Act, 18 U.S.C. §1201(a), "needlessly encourage[d]" guilty pleas by limiting the death penalty to those convicted after trial. "The inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." 390 U.S. at 581, 88 S.Ct. at 1216, 20 L.Ed.2d at 147. That premise is an antiquated remnant of the days when plea bargains were looked upon as something sordid, as they very often were:

> In the year 1969, a defendant seeking to plead guilty in federal court was required to lie in order to have the plea accepted. The defendant needed to assert under oath that no promises had been made in return for his plea of guilty. The prosecutor, who had made such promises, and the defense counsel, who had secured them, stood by silently in violation of their obligation to insure against the knowing use of false testimony. Once the plea had been accepted, the prosecutor would typically move to dismiss some of the charges against the defendant and the court would grant the motion.

D. Givelber, *Punishing Protestations of Innocence: Denying Responsibility and its Consequences*, 37 Am.Crim.L.Rev.

1363, 1365-66 (2000). This "charade" was largely attributable to the belief "that securing a plea through promises of leniency was unconstitutional." That preconception, as the author aptly notes, has long since "been swept away" by this court's "open acknowledgment of this previously clandestine practice," *Bordenkircher v. Hayes*, 434 U.S. 357, 362, 98 S.Ct. 663, 667, 54 L.Ed.2d 604, 609-10 (1978), and the hostility to plea bargaining that underlies *Jackson* is an anachronism.

The New York statutes at issue in this case of course do, in the words of *Jackson*, encourage pleas and discourage trials -- in the same way as every other state and federal law that, as written or in practice, recognizes the reality of plea bargaining. It is, quite simply, no longer perceived to be undesirable, let alone unconstitutional, to do so. Within a few years of *Jackson*, this Court wisely came to accept that the widespread practice, properly administered, is not merely tolerable but worth being "encouraged" as an "essential" and "desirable" "component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260-61, 92 S.Ct. 495, 498, 30 L.Ed.2d 427, 432 (1971).

A plea bargain, by definition, involves an inducement to the defendant, usually the "certainty or probability" of a lesser sentence, in return for freeing the prosecution from the costs and vagaries of trial. The offer, if there is one, inevitably has "a discouraging effect" on the impetus to go to trial -- indeed, that is its purpose -- but, despite how the Court of Appeals read *Jackson*, presenting a defendant with "difficult choices" is not unconstitutional. *Chaffin v. Stynchcombe*, 412 U.S. 17, 30-31, 93 S.Ct. 1977, 1985, 36 L.Ed.2d 714, 725-26 (1973).

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult

> choices [is] an inevitable" – and permissible – "attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.

Bordenkircher, 434 U.S. at 364, 98 S.Ct. at 668, 54 L.Ed.2d at 611, (internal citations omitted); *Corbitt v. New Jersey*, 439 U.S. 212, 220-21, 99 S.Ct. 492, 498, 58 L.Ed.2d 466, 475 (1978).

Corbitt accordingly upheld a state statute which, like the provisions at issue here and in *Jackson*, permitted defendants to avoid the maximum punishment for the offense in question by pleading guilty. Rather than overrule *Jackson*, however, *Corbitt* chose to distinguish it on two grounds: that "under New Jersey law, the maximum punishment for murder is life imprisonment, not death" and "New Jersey does not reserve the maximum punishment for murder for those who insist on a jury trial" because the statute gives "no assurance" that the judge would "favor" the defendant with something less than a life sentence after accepting a *non vult* plea. 439 U.S. at 217, 99 S.Ct. at 496-97, 58 L.Ed.2d at 473. But with the passage of time, these distinctions have ceased to make a difference.

The notion that because the death penalty is unique in its severity and irrevocability, any inducement to avoid it is so powerful as to be intrinsically unfair was rejected even before *Corbitt*. In *Brady v. United States*, 397 U.S. 742, 90 S.Ct.1463, 25 L.Ed.2d 747 (1970), the defendant pleaded guilty under the same act that the *Jackson* court condemned for discouraging defendants from insisting on their innocence and demanding

a trial by jury. Brady was explicitly warned that he would face death if and only if he were convicted after trial and his fear of that outcome was shown to have been a factor in his decision. Nonetheless, his plea, however much the product of such a "difficult choice," was upheld as voluntary. *Accord, North Carolina v. Alford*, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27 L.Ed.2d 162, 167 (1970) ("that a plea of guilty which would not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years [is] not for that reason compelled within the meaning of the Fifth Amendment"). After *Brady* and *Alford*, the difference between pleading guilty to avoid a death sentence, as was statutorily authorized in this case; and doing so to avoid a mandatory life sentence, as in *Corbitt* and a myriad of other cases, is one of constitutionally insignificant degree.

Nor is it any longer meaningful to condemn statutes, like New York's, which absolutely prevent judges from imposing death sentences after guilty pleas, while upholding those which leave open the possibility that a court will deny that "favor." To whatever extent Corbitt was better off without a statutory "assurance" that his plea bargain would be kept, due process now guarantees, as surely as any legislation, that the state will adhere to its end of the bargain. *Santobello, id.* There is no question that if respondent had pleaded guilty, he would have avoided the death penalty. Whether he confirmed that by reading it in a statute book or by hearing a judge promise it in open court is not, or at least should no longer be viewed as, constitutionally significant. The Court of Appeals was wrong to perpetuate that distinction as it did. A. 98.

It has been observed that a "close[] analysis of *Jackson*, together with the Supreme Court's post-*Jackson* decisions that

directly or indirectly involved plea bargaining and the death penalty, reveals that *Jackson* remains -- more than thirty years after it was handed down – a completely mystifying decision." Hoffman, Kahn & Fisher, *Plea Bargaining in the Shadow of Death*, 69 Fordham L. Rev. 2313, 2373 (2002). The state believes that it can be understood as a product of its times, in which plea bargaining was viewed similarly to the life-or-death choice offered to the character in Mario Puzo's "The Godfather," who was told that either his signature or his brains were about to appear on the contractual release that the Don had just put in front of him. Plea bargaining in a capital case today is more like informing the defendant that if he or she does not plead guilty during the months or years that pretrial motions are being adjudicated; and if the motions are all decided in favor of the prosecution; and if there is a verdict of guilty on one or more narrowly defined offenses; the defendant will then be afforded a separate sentencing proceeding, at which there will be a vast opportunity to present arguably mitigating evidence, before the jury can impose a death sentence -- which will, in turn, be the gateway to years of post-trial proceedings.

In this case, for example, the indictment was returned in 1996, whereupon it was challenged by a statutorily-mandated team of defense attorneys in more than 60 pretrial motions, some of which were reargued two and three times before the case finally reached the jury in 1999. The record on appeal is almost 42,000 pages and reflects, at page 6022, that on the eve of trial, the defense, at least, recognized that plea bargaining was still statutorily authorized. However much the take-it-or-leave-it nature of a guilty plea under the Federal Kidnapping Act made it seem like an offer the defendant could not refuse, *id.*, time has fundamentally altered the balance and mooted the perceived need to redress it.

The current tactical posture, reflecting what the New York Court of Appeals referred to as "substantial changes in the administration of capital punishment," is in part the result of decisions by this Court expanding the procedural rights of capital defendants. Probably the most significant, and most conspicuously absent at the time *Jackson* was decided, is that the adjudication of guilt is followed by "a separate sentencing proceeding before a penalty jury," an innovation which the *Jackson* court dismissed as too novel to even contemplate in the absence of statute. 390 U.S. at 578-79, 88 S.Ct. at 1214-15, 20 L.Ed.2d at 145. That now-common procedural right, codified in N.Y.Crim.Pro.Law §400.27, enables capital defendants, after conviction, to present any mitigating evidence to the same or a different jury, which must find, if it has not already, the existence of aggravating factors warranting the death penalty and only then weigh them against such mitigating factors as are offered. *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). Much of this was unheard of thirty-five years ago, and when this court approved the bifurcation of guilt and sentencing proceedings in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), it strongly indicated that the needlessly coercive effect of the Federal Kidnapping Act had thereby been ameliorated. *Id.* at 192, 96 S.Ct. at 2934, 49 L.Ed. at 885, n. 41. This case presents the opportunity to recognize that modern procedural changes have, as that somewhat cryptic footnote implied, significantly ameliorated what *Jackson* saw as the "inevitable effect" of a different statute in a different age.

In addition, under New York law, both the consent of the prosecutor and the permission of the court are required before a guilty plea to murder in the first degree is accepted, thus further assuring against impulsive or improvident pleas.

N.Y. Crim.Pro.Law §§220.10(5)(e), 220.30(3)(b)(vii). This was not so under the Kidnaping Act, which "unequivocally" stated that the verdict of the jury "shall" be given effect and thereby denied the court any discretion. *Jackson*, 390 U.S. at 574-75, 88 S.Ct. at 1212-13, 20 L.Ed.2d at 142-43. The Court of Appeals, however, viewed New York's consent and approval process as insignificant because this court subsequently cited *Jackson* in nullifying a set of death sentences imposed in North Carolina when that state had a similar statute on its books. A. 96-97. However, as the court recognized, those summary dispositions do not provide a rationale nor address the distinction; and at least some of the sentences that were overturned were for crimes that were committed before the law changed and thus while that state had no constitutionally valid death penalty other than through ex post facto application. *State v. Williams*, 26 N.C. 703, 714, 174 S.E.3d 503, 510-11 (1970)(dissenting op.), *rev'd sub nom. Williams v. North Carolina*, 403 U.S. 948, 91 S.Ct. 2290, 29 L.Ed.2d 860 (1971). At best, these cases constitute the immediate progeny of *Jackson* that the Court of Appeals aptly described as ripe for reconsideration.

Respondent will probably answer that, notwithstanding "the increased significance of plea bargaining and substantial changes in the administration of capital punishment," there is no need to revisit *Jackson* because so many other states have been able to enact statutes consistent with it. But as the Court of Appeals pointed out, almost all of them have done so by reserving the possibility that even after a plea, the judge will impose a death sentence. A. 100-01. Although this resolution conforms to the letter of *Jackson*, plea bargaining is, as noted above, now so well-understood, and the incidence of death sentences imposed after negotiated pleas so rare, that the possibility approaches a fiction. The Court of Appeals did not, and petitioner believes it cannot, point to a single incident in

which a modern defendant has been surprised by a death sentence after a plea bargain, let alone present any reasoned argument why that possibility makes statutes which permit it more constitutional than the law in New York. Nevada law, which the Court of Appeals applauded for having "avoided a Jackson problem," also guarantees a prison sentence to any defendant who pleads guilty with the prosecutor's consent, as in New York, but with the supposed saving virtue of allowing a defendant to avoid that assurance by asking to have the sentence, which in theory could be death, determined by a judicial panel instead. To the extent that this option satisfies *Jackson*, it does so only because its precedential value has been so "limited by later decisions," *Conger v. Warden*, 89 Nev. 263, 265, 510 P.2d 1359, 1361, n.2 (1973), that the strict letter of the precedent is followed while its reasoning is not.

The New York Legislature has chosen not to rely on such a device, possibly because it was adverse to hypocrisy but more likely because, in the view of at least some authorities, it would have violated the State constitutional ban on waiving a jury trial for a crime that "may be punishable by death." *United States ex rel. Brown v. LaVallee*, 424 F.2d 457, 461-63 (2d Cir.), *cert. denied* 401 U.S. 942, 91 S.Ct. 946 28 L.Ed.2d 223 (1970) (under N.Y.S.Const., Art.I, sec.2, jury is "one body" authorized to impose death sentence). That provision represents a valid policy interest in preventing "suicide by plea." Thus, a guilty plea to first degree murder was permitted only if the "agreed upon sentence" was one other than death. N.Y.Crim.Pro.Law §§220.20(5)(e), 220.30(3)(b)(vii). Contrary to the conclusion of the Court of Appeals, those provisions are consistent with justice and with the post-*Jackson* decisions. Indeed, they are consistent with *Jackson* itself insofar as precluding state judges from imposing death sentences after pleas is not "needlessly" burdensome but necessary under the State Constitution.

In holding the statutory solution to be unconstitutional, the Court of Appeals went on to sanction guilty pleas to lesser offenses, such as second-degree murder, as well as first-degree murder when a notice of intent to seek the death penalty is not "pending." A. 103. The former is a permissible option, the court declared, because "nothing in *Jackson* prohibits" it and the latter appears to be based on the court's observation that an Arkansas statute was held constitutional because guilty pleas were permitted "only after the prosecutor waived the death sentence." A. 101, citing *Ruiz & Denton v. State*, 275 Ark. 410, 630 S.W.2d 44, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982). These dicta further illustrate the error in trying to apply *Jackson* after thirty years of change.

While it is true that "nothing in *Jackson*" prohibits, in so many words, offering a capital defendant the opportunity to plead guilty to a lesser offense carrying a lower sentences, that option does nothing to relieve what the Court of Appeals saw as the constitutional flaw in permitting a plea to first degree murder with the promise of a life sentence: the "chilling" pressure to "exercise Fifth and Sixth Amendment rights and risk death, or abandon those rights and avoid the possibility of death." A. 92. If enhancing the reward for pleading guilty does anything, it increases the likelihood that one will do so.

Similarly, allowing a plea to murder in the first degree so long as the death penalty is not "pending," such as during the 120-day period in which the prosecutor has to file a notice of intent to seek it, N.Y.Crim.Pro.Law §250.40(2), merely imposes a deadline for the same election that the court found to be intolerably onerous when it is made at leisure. And if a guilty plea is permitted because the prosecutor is deemed to have withdrawn that notice simply by negotiating, *see, People v. Hall*, 291 A.D.2d 143, 738 N.Y.S.2d 782 (4th Dept), *lv. denied*, 98 N.Y.2d 651, 745 N.Y.S.2d 510 (2002), that creates a fiction

that in no way lessens the "needless encouragement" of guilty pleas. *Ruiz & Denton*, like *Conger*, sanctions such a solution only because "the holding in *Jackson* has been eroded in recent decisions." 275 Ark. at 46, 630 S.W.2d at 413.

As observed by one neutral commentator, the Court of Appeals' "failure to make sense out of *Jackson*" has produced "confusion and uncertainty" among the lower courts that have endeavored to apply it. "The jurispurdential tension created by *Jackson* and the post-*Jackson* decisions is palpable and hampers the ability of the New York Courts to achieve both doctrinal and practical stability in this important area of the law." Hoffman, et al, *Plea Bargaining in the Shadow of Death*, 69 Fordham L. Rev. at 2391.

In sum, the Court of Appeals' effort to enforce *Jackson*'s hostility to plea bargaining so many decades after *Brady* is simply "untenable." Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Cal.L.Rev. 471, 482 (1978). The former, and its few progeny, can be reconciled with the latter and a host of cases consistent with it only by viewing the inducement to plead guilty and avoid the death penalty as unconstitutional when, and only when, the defendant has proven impervious to it. Respondent would have had no cause for complaint if, like Brady, he had capitulated to the supposedly "unnecessary" pressure; it is only because he exercised his rights to remain silent and proceed to trial that those rights were held to have been compromised. That does not make sense and therefore does not make for good law.

To whatever extent the burden of choosing whether or not to plead is still regarded as onerous after decades of open and regulated plea bargaining, the added features of New York law, including bifurcated sentencing and judicial and prosecutorial consent to pleas, are enough of a remedy. The Constitution should not be read, as the Court of Appeals did,

in a way to make the cure worse than the virtually eradicated disease. Even if that court was correct in concluding that it was jurisprudentially bound to find some way of reconciling *Jackson* with the realities of modern practice, it was also correct in recognizing that *Jackson* would likely be decided differently today and inviting this court to revisit it. *United States v. Hatter*, 532 U.S. 557, 567, 121 S.Ct. 1782, 1790, 149 L.Ed.2d 820, 831 (2001). As in that case, the invitation should be accepted.

Finally, no significance should be attached to the denial of certiorari from the interlocutory decision in *Hynes v. Tomei*. It was still uncertain whether that decision would affect this case or any other. See A. 8-11. But now, a confessed and fairly convicted murderer has evaded the punishment that the law provides and the jury unanimously imposed solely because if he had pleaded guilty instead, and if the judge and prosecutor agreed, he would have received a prison sentence. There is nothing wrong with that alternative and it is time to say so.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

DECISION OF NEW YORK COURT OF APPEALS, FEBRUARY 24, 2004, VACATING DEATH SENTENCE

The People &c., Respondent, v. Angel Mateo, Appellant.

OPINION OF THE COURT

KAYE, CHIEF JUDGE:

Defendant's case, here on direct appeal from a jury verdict of guilt of first degree murder and a jury sentence of death, has a complex history that we know well (see People v Mateo, 93 NY2d 327 [1999]; Matter of Relin v Connell, 92 NY2d 613 [1998]). Implicated in four murders and other violent crimes in Rochester, on December 22, 1996, defendant was charged in a 22-count indictment with, among other things, three counts of first degree murder [FN1] . Count 10 of the indictment, contested in this appeal, alleged that on or about November 2, 1996, in the course of and in furtherance of first degree kidnapping, defendant intentionally caused the death of Juan Rodriguez-Matos, or, intending Matos' death, commanded another--his wife, Monica Szlekovics--to kill him (Penal Law § 125.27[1][a][vii]). In either circumstance, the cause of death was alleged to be a gunshot wound.

Counts 11 and 12 of the indictment charged defendant with first degree murder on a serial killer theory that he acted "in a similar fashion" when, within a 24-month period, he intentionally murdered four individuals, including Matos. On defendant's motion, the Trial Judge dismissed those counts (175 Misc 2d 192 [Monroe County Ct 1997, Connell, J.]), and the Appellate Division affirmed (249 AD2d 894 [4th Dept

1998]). We affirmed, concluding that the evidence presented to the Grand Jury was insufficient to establish that the killings at issue were "committed in a similar fashion" under Penal Law § 125.27 (1)(a)(xi) (People v Mateo, 93 NY2d 327).

Prior to trial, relying on United States v Jackson (390 US 570 [1968]), defendant challenged the plea provisions of New York's recently enacted death penalty statute (L 1995, ch 1). He argued that those provisions [FN2] created a two-tiered system of punishment for the same offense, because only those who went to trial faced the death penalty while those who waived a jury trial and pleaded guilty did not. This scheme, he argued, impermissibly burdened his Fifth and Sixth Amendment trial rights. The Trial Judge, adhering to Jackson, held the plea provisions unconstitutional, but the Appellate Division subsequently declared them constitutional (Matter of Relin v Connell, 251 AD2d 1041 [4th Dept 1998]). Defendant thereafter went to trial, while an appeal of the Appellate Division ruling was pending in this Court. Ultimately, bound by Jackson, we reversed, struck the plea provisions as unconstitutional and, in a consolidated appeal, severed them from the statute (Matter of Hynes v Tomei; Matter of Relin v Connell, 92 NY2d 613).

I.

The facts of defendant's case, elicited at trial, are no less complicated than its legal history. The main participants in the events of October 8 through November 6, 1996 were defendant (then age 27), his wife (Monica, 20), his estranged girlfriend (Janette Sanchez, 25) and his brother (Victor Cordero, 16). Forty-nine witnesses, many of them civilians who had crossed paths with defendant, testified for the People. The defense called one witness, to testify regarding a bullet wound in defendant's leg.

Though married to Monica, defendant had been living with Janette since November of 1995 in what was, to say the least, an abusive relationship. Janette told the jury that soon after she and her three young children moved in with defendant, he began terrorizing her: he hit her in the face, beat her in front of her children, threatened to stab her, and more than once aimed a gun at her and threatened to pull the trigger. At one point, he shot a round into the floor of their bedroom in front of her.

As Janette testified, on October 8, 1996, in a fit of rage over a busy telephone line, defendant hit her, and then began hitting her five-year-old daughter with a belt. Defendant locked them in the house, and left. Janette and her daughter escaped through a bedroom window. Janette then sought shelter at Alternatives for Battered Women, and remained there with her children. Three days later, on October 11th, defendant and Monica, in pursuit of Janette, showed up at 966 Avenue D, the home of Maria Sanchez (Janette's sister), Jose Roman (Maria's boyfriend) and Maria's four-year-old daughter. Jose explained to the jury that he opened the door and defendant pointed a gun at his forehead. Defendant handcuffed him behind his back, put the gun to the back of his head and told him to lie down. For more than three hours, defendant and Monica held the family hostage while defendant ordered Maria to keep phoning Janette. Finally, Maria reached her and after defendant spoke to her, he and Monica left.

Throughout October, defendant persisted in his efforts to find Janette. He sent Monica to the shelter to give Janette his pager number so that she could call him. On October 16th, while Janette was at the Department of Social Services, defendant and Monica appeared, and defendant coaxed Janette into going to his apartment, without Monica. Soon

after, Monica appeared at the door with a gun. She left, and defendant told Janette that he wanted to kill himself. Instead, he pointed the gun at Janette's chest and said he would kill her because he could not allow her to be with anyone else. Janette later managed to return to the shelter. Two days later, defendant and Monica again accosted Janette on the street. When she ran to a nearby office, defendant followed her inside but security guards called the police. Between October 8th and October 24th, defendant kept calling and leaving messages for Janette at the shelter. On October 24th, fearful that defendant would harm Maria, Janette went back to defendant for six days. On October 29th, a social worker from Child Protective Services helped Janette and the children move to another shelter. No longer reachable at Alternatives for Battered Women, it seemed that Janette had disappeared.

As defendant later conceded to police, his attack on the child had ended his relationship with Janette. He admitted searching the city for her, and acknowledged that he would hurt anyone who got in his way. One unfortunate victim was Juan Rodriguez-Matos, age 20. On or about November 2, 1996, defendant was driving around the east side of Rochester with Monica and Victor, still looking for Janette. Defendant spotted Matos on the street, and remembered that he and Janette had a friend in common, Glyselle, who might have information about Janette. Defendant ordered Monica, who was driving, to circle the block so he could confront Matos. He then directed her to stop, got out of the car and approached Matos, demanding to know Glyselle's address. When Matos refused to answer, defendant forced him into the car at gunpoint and they drove to defendant's house. There, defendant handcuffed Matos, brought him into the bathroom and questioned him. Matos finally gave defendant an address, but by that time defendant had already decided to take him to the basement

and execute him. Defendant told police that he made this decision and Monica and Victor were following his orders --Monica and Victor did what he told them to do. [FN3]

Defendant admitted to the investigators that while in the basement, he put a dark handkerchief over Matos' eyes, and then "shot the dude in the left side of his head as he stood there." Matos fell on the floor, but was still alive, so defendant put a plastic bag over his head. He died some time later. In the middle of the night, defendant, Monica and Victor wrapped the body in a blanket and some curtains and left it in an alley near where defendant used to work. A subsequent autopsy of Matos' body revealed that, although he aspirated gastric contents into his lungs, the cause of death was the gunshot wound to the head. Defendant later told police during questioning that he had handed the gun to Monica and that, in actuality, it was she who pulled the trigger and he was "surprised." For the most part, he insisted that he had fired the fatal shot, but he alternated back and forth. In a third version, defendant claimed that even though Monica had pulled the trigger, he was a "king" and would take the blame because he wanted the death penalty and could not "do a hundred years in jail." When police typed his written statement, defendant claimed to have pulled the trigger himself.

On November 6th, defendant, Monica and Victor carried out a second home invasion at 966 Avenue D. On that day, they went back to Maria and Jose's apartment house, but hid in the basement. Defendant still wanted to find Janette, and told Monica and Victor that Janette had filed a police complaint against him. Defendant later explained, "[t]hat was a lie and I was using them to help me get my girl back." After waiting about three hours, defendant said "let's go upstairs." Defendant told Monica to knock on the first floor apartment door (Maria lived on the second floor); when the occupant--Willie

McWilliams--opened the door, defendant put a gun to his face.

McWilliams testified that defendant hit him on the left side of his head with the gun, and told him to "get on the floor." A stranger to defendant and his objectives, McWilliams dropped to his knees and Victor handcuffed him. Asked who else was in the house, first McWilliams said "nobody," but then said that his girlfriend and son were sleeping. Defendant checked the other room, grabbed a knife, came back, and said, "I never taken out a little kid before." Victor said, "we got to take them all out." McWilliams yelled out to his girlfriend to run. Defendant stepped on McWilliams' back and cut him across the throat. When McWilliams reared up, defendant fell backwards, began shooting and struck him in the shoulder and back. One of McWilliams' handcuffs came loose and he hit defendant in the face. Defendant fell again, dropping his gun, and apparently was shot in the leg during the fray. Defendant and Victor took off, leaving Monica behind. McWilliams held her down while his girlfriend, who escaped to a neighbor's house, called 911. After the police arrested Monica at the scene, she provided information leading to the arrest of defendant and Victor. They were apprehended later that day in a car with defendant's mother, another brother and a cousin.

Now, following a jury trial, defendant stands convicted of first degree murder and other charges [FN4]. After a penalty proceeding in which he presented mitigating evidence, the jury sentenced defendant to death.

Defendant's mandatory appeal, raising 22 issues, was noticed February 11, 1999, and comes to us directly from the Trial Court pursuant to our unique jurisdiction in death penalty cases (NY Const art VI, § 3[b]; CPL 450.70 [1]) [FN5]. Defendant argues that Matter of Hynes v Tomei (92 NY2d 613) and People v Harris (98 NY2d 452 [2002]) require overturning his death sentence, because he went to trial under what we

have held to be an unconstitutional two-tiered penalty scheme. We agree, and conclude that the death sentence must be set aside.

Defendant also contends that his right to due process was violated by the prosecutor, on the ground that inconsistent factual theories were presented at his and Monica's separate trials. We disagree, and determine that the prosecutor's actions did not breach defendant's right to a fair trial. Defendant claims that the jury verdict of guilt of first degree felony murder is against the weight of the evidence. We dis-agree, and in our review of the facts conclude that the weight of the evidence comports with the jury determination that defendant kidnapped Matos, and in the course of and in fur-therance of that crime, either intentionally shot and killed him or commanded his wife and cohort, Monica, to do so. [FN6]

Finally, defendant maintains that certain evidentiary errors, including the admission of his statements about three other murders, mandate the reversal of his conviction. We disagree. Defendant's trial strategy opened the door to the admission of his voluntary statements, to rebut the assertions that he gave false statements to police exaggerating his role in the Matos murder in order to exculpate his wife.

II.

Defendant contends that an Appellate Division declaration made prior to his trial--holding the plea provisions of New York's death penalty statute constitutional--subjected him to an unconstitutional penalty scheme, and that our subsequent decisions in Matter of Hynes v Tomei and People v Harris mandate that we set aside his death sentence. In Hynes, we struck the plea provisions as uncon stitutional and severed them from the statute, on the ground that they created a two-tiered punishment scheme that burdened the rights of

defendants who went to trial (92 NY2d 613). In Harris, we set aside the death sentence of a defendant who went to trial while the plea provisions were in effect (98 NY2d 452, 494-496). We break no new ground by applying these precedents, and dispose of defendant's Hynes claim first, striking defendant's sentence of death.

The People and the Attorney General maintain that in this case, the Trial Court's order declaring the plea provisions unconstitutional controlled the course of the litigation, and that defendant actually went to trial under a lawful statute. The question before us is whether a subsequent declaration by the Appellate Division, Fourth Department, that the plea provisions were constitutional (251 AD2d 1041), rendered those provisions operative in his case. The People and the Attorney General concede that if the plea provisions were in effect during defendant's case, the death sentence must be vacated.

A brief procedural history is required to frame the issue. Defendant was indicted on first degree murder and other charges on December 19, 1996, and the prosecution filed its notice of intent to seek the death penalty pursuant to CPL 250.40(2) on January 17, 1997. On April 24, 1997, defendant moved to strike the death notice and the plea provisions of New York's death penalty statute as unconstitutional, relying on United States v Jackson (390 US 570). In Jackson, the United States Supreme Court invalidated the death penalty provision of the Federal Kidnaping Act (18 USC § 1201[a]) because, in relevant part, by encouraging jury waivers to avoid the death penalty, the provision impermissibly burdened defendants' Fifth and Sixth Amendment rights. Relying on Jackson, the Trial Court, on August 25, 1997, granted defendant's motion to the extent that it declared the plea provisions unconstitutional (175 Misc 2d 192).

The People then commenced an article 78 petition in the Appellate Division seeking a writ of prohibition to bar both the Trial Judge and defendant from enforcing the order declaring the plea provisions unconstitutional. On June 10, 1998, the Fourth Department converted the article 78 proceeding to a declaratory judgment action and held the plea provisions constitutional (251 AD2d 1041). Jury selection commenced on September 1, 1998 and the jury was sworn on November 9, 1998. On December 3, 1998, the jury found defendant guilty of first degree murder and other charges, and on December 16, 1998, sentenced him to death.

Six days later, on December 22, 1998, this Court reversed the order of the Fourth Department, as well as a comparable order of the Second Department, and struck the plea provisions as unconstitutional under authority of Jackson (92 NY2d 613). Shortly thereafter, defendant moved to set aside his death sentence, relying on Hynes. On January 15, 1999, the Trial Judge summarily denied the motion and ordered the death sentence to be carried out based on the jury's determination. Defendant now contends that the Fourth Department ruling upholding the plea provisions was in effect in his case when he went to trial and therefore the trial was conducted under a Jackson-violative statute. We agree.

To be sure, defendant received a favorable pretrial ruling from the trial court striking the plea provisions from the statute. By the time that defendant's trial commenced, however, the Appellate Division had declared the plea provisions constitutional, in an action by this District Attorney against this Trial Judge and this defendant. That ruling was binding in the Fourth Department (see e.g. Duffy v Horton Mem. Hosp., 66 NY2d 473, 475 [1985]). Based on that binding precedent, we conclude that defendant could have sought to avoid exposure to a death sentence only by waiving his right

to a jury trial and pleading guilty.

Matter of Morgenthau v Erlbaum (59 NY2d 143 [1983]) does not mandate a different result in this case. We held in Erlbaum that "a declaratory judgment attacking a criminal court's interlocutory ruling may be granted when the controversy is over the validity of a statute, * * * and there is no immediate attempt to prevent the criminal court from proceeding on the course which it has charted by its ruling" (id. at 151-152). Erlbaum , moreover, contemplates that an individual defendant will not be a party to the declaratory judgment action. (Here, defendant was a party.) The Appellate Division order--determining the validity of the statute--did not reverse the Trial Court's order, or immediately prevent the Trial Court from proceeding on its course. At the time the Appellate Division ruled, the case was several months from being tried. There was no ensuing delay of trial. Indeed, defendant went to trial while the Appellate Division ruling, reinstating the plea provisions, was simultaneously challenged in this Court. Thus, the "concern over obstructing the speedy resolution of cases" (id. at 152) did not arise. In these circumstances, Erlbaum's policy considerations – protecting criminal trials from interference, or even undoing, by interlocutory appeals--were not implicated.

Exactly the situation Jackson held untenable, however, occurred here. Like any other capital defendant in the Fourth Department, had defendant sought to waive his right to a jury trial and plead guilty--with the appellate court's ruling in hand--it was highly improbable that the Trial Judge would have ignored the order of the Appellate Division. Thus, the fortuitous timing of defendant's trial, sandwiched in between the Appellate Division ruling and this Court's decision striking the plea provisions, contributed to a unique situation in which defendant's Fifth and Sixth Amendment trial rights

were burdened and he was tried under an unconstitutional two-tiered penalty scheme. The sentence of death therefore must be set aside, and we turn next to defendant's challenges to the verdict of guilt.

III.

Defendant contends that the prosecutor violated due process by positing, in his trial, a theory of first degree murder factually inconsistent from that argued at Monica's trial. He also maintains that the Trial Court erroneously instructed the jury that it could find defendant guilty of first degree murder whether he shot Matos or commanded the killing, and that the jury verdict on that count is against the weight of the evidence.

A. The Prosecution's Theories

Monica was prosecuted separately--about a year before defendant's trial--on the theory that she was guilty, as the shooter, of intentional first degree felony murder (Penal Law § 125.27[1][a][vii]) in the course of and in furtherance of first degree kidnapping, in a noncapital trial. The jury acquitted her of that count but convicted her of second degree felony murder and first degree kidnapping. At his trial, defendant sought to preclude the prosecution from arguing in his case that he was the shooter, on the ground that the People previously dismissed that theory in Monica's case.

The Trial Court rejected defendant's claim, determining that at defendant's trial, the People were free to argue alternatively that either defendant or Monica--commanded by defendant--pulled the trigger. The court concluded that "the People are merely intending to argue reasonable views of the evidence that could be drawn from the testimony and physical evidence" (177 Misc 2d 817, 818 [Monroe County Ct 1998, Connell, J.]).

Defendant claims that by advancing purportedly inconsistent theories, the People corrupted the truth-finding function of the trial. It is settled that a prosecutor may not knowingly present admissible but false information to a jury (People v Pelchat, 62 NY2d 97, 105 [1984]). Of course, in the circumstances of this case, where defendant and Monica implicated not only themselves but also each other, the People could not know who the shooter was-- only defendant and Monica knew.

Defendant contends that at the separate trials, the prosecution presented diametrically opposed versions of his role in the shooting. To be sure, at Monica's trial for first degree felony murder, the prosecutor argued that Monica shot Matos. But at defendant's trial, the prosecutor presented that very same proposition, again arguing that Monica intentionally shot him, albeit under defendant's orders. Defendant was not "resculpted" from a mere sideliner to a main participant (cf. United States v Salerno, 937 F2d 797, 812 [2d Cir 1991], revd on other grounds, 505 US 317 [1992]). In both trials, defendant was portrayed as the "driving force" behind the crime. Additionally, the People maintained that, based on defendant's own written statement, it was also reasonable to conclude that he was the one who pulled the trigger. Thus, defendant's jury considered the same argument that the prosecutor presented at Monica's trial, and also considered a theory supported by defendant's own words.

In assessing this claim, we find Nguyen v Lindsey (232 F3d 1236 [9th Cir 2000]) persuasive. There, an innocent bystander was killed in the crossfire of a shootout between two rival gangs; two combatants were charged with murder and separately tried. At the trial of defendant Phung, the prosecutor presented evidence that Phung shot first. At the trial of defendant Nguyen, the prosecutor introduced

Nguyen's own statement to police that a cohort in his car, Cholo, had fired first. The Ninth Circuit held that the prosecutor did not pursue fundamentally inconsistent theories in violation of due process, even though different evidence was presented at each trial (id. at 1241). Although the prosecutor made divergent arguments at each trial as to who fired the first shot, the court concluded that these arguments were consistent with the evidence actually adduced at each trial (id. at 1240).

Here, as in Nguyen, the evidence against Monica at her trial was her own statement that she killed Matos after defendant gave her the gun and whispered in her ear to shoot him in the head [FN7] . The evidence at defendant's trial was his self-incriminating admissions that he intended to execute the victim, and either shot the victim or commanded Monica to do so.

Nguyen also distinguished Thompson v Calderon (120 F3d 1045 [9th Cir 1997] [en banc] [plurality opinion], revd on other grounds 523 US 538 [1998]), relied on by defendant. In Thompson , separate trials were conducted of two suspects in the rape and murder of Ginger Fleischli. Testimony by jailhouse informants at a preliminary hearing revealed that defendant Leitch wanted Fleischli dead because she was interfering with his attempts to reconcile with his ex-wife (120 F3d 1055). On the night of the murder, defendant Thompson allegedly had consensual sex with Fleischli. Afterward, Leitch arrived and he and Thompson killed her.

At Thompson's trial, the prosecution presented other witnesses who testified that Thompson had confessed to raping and killing Fleischli before Leitch got home, and that he killed her to prevent her from reporting the rape (id. at 1056). Thompson was convicted of first degree murder and sentenced to death. Then, at Leitch's trial, the prosecutor

called mostly defense witnesses from Thompson's trial, who testified about Leitch's motive for killing Fleischli, his threats against her and his violent disposition. A plurality of the court concluded that in Leitch's trial, the prosecutor returned to his original theory and discredited the very evidence he had previously offered in Thompson's trial, so that Thompson, rather than Leitch, suffered from the due process deprivation (id. at 1059). In Nguyen, by contrast, the court found it compelling that both defendants could be found guilty of the same crime because of its nature (232 F3d at 1240).

The circumstances of defendant's case are closer to Nguyen than Thompson . The prosecutor never discredited the central evidence he previously offered to convict Monica, but instead used that evidence to prove that defendant commanded her to shoot Matos. Thus, as the People sought to prove, both defendants could have been guilty of first degree murder. The argument that defendant was the shooter was also properly adduced at trial, based on his admissions. In these circumstances, the People should not have to choose one defendant over the other to prosecute as the shooter.

Defendant also argues that at Monica's trial, she was portrayed by the People as acting with free will, whereas at defendant's trial, the evidence showed that she was abused and acted at defendant's command. These positions are not inherently inconsistent. At Monica's trial, the People were countering her duress defense, and sought to show that she was capable of freely committing the murder. The prosecution acknowledged that Monica was abused, but argued that the abuse did not mean she could establish duress: "What was the abuse? What did it consist of? * * * [W]hat effect does it have on this case? * * * [Y]ou're going to hear that Angel Mateo was a bad man, and I anticipate you are going to hear that he was the driving force here, but I also anticipate you are going to

hear that Monica Szlekovics was involved." At defendant's trial, by contrast, duress was not in the case. The People were entitled to show that, fearful or not, Monica could have willingly followed defendant's command.

B. The Command or Actual Killer Instruction

Defendant claims that it was error for the Trial Court to instruct the jury that it could convict defendant of first degree murder either as a commander or shooter. Penal Law § 125.27(1)(a)(vii), the "felony murder" provision of the first degree murder statute (see People v Harris, 98 NY2d 452, 475-477), states that a person is guilty of first degree murder when, with intent to cause the death of another person, he causes the death of that person or a third person, and:

> "the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of * * * kidnapping in the first degree * * *; provided however, the victim is not a participant * * * and, provided further that, unless the defendant's criminal liability under this subparagraph is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter, this subparagraph shall not apply where the defendant's criminal liability is based upon the conduct of another pursuant to section 20.00 of this chapter." [FN8]

In turn, Penal Law § 20.00 , the accessorial liability provision, provides that "[w]hen one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids

such person to engage in such conduct."

Based upon the plain language, it is clear that the Legislature has set forth a single circumstance by which to impose accessorial liability for first degree felony murder. An actor may be found guilty as an accessory under Penal Law § 125.27(1)(a)(vii) only when the theory proved by the prosecution is that the defendant commanded the killing (see People v Couser, 94 NY2d 631, 635 [2000] ["a defendant's criminal responsibility for murder in the first degree can be based upon the conduct of another when that defendant 'commanded another person to cause the death of the victim or intended victim'"] [emphasis in original]).

By comparison, the Legislature chose not to limit accessorial liability for the other 12 subdivisions of the first degree murder statute (see generally People v Cahill, __ NY2d __, 2003 NY Slip Op 18881 [Nov. 25, 2003] for a discussion of 13 aggravating factors of first degree murder statute). It is only the felony murder aggravator that is so limited. Indeed, the Assembly Committee Bill Memorandum explains that the felony murder provision "excludes defendants whose criminal liability under this subparagraph is based upon the conduct of another person, unless the defendant commanded another person to cause the death of the victim or intended victim" (Mem of Assembly Codes Comm, Bill Jacket, L 1995, ch 1, at 22 [emphasis added]). [FN9]

The legislative history supports the conclusion that, while the Legislature limited accessorial liability for first degree felony murder to "commanding," it did nothing to upset the settled principle that "[t]here is no distinction between liability as a principal and criminal culpability as an accessory" (People v Duncan, 46 NY2d 74, 79-80 [1978]). When it enacted the statute, the Legislature was surely aware of our decisions interpreting the accessorial liability statute (see

generally People v Robinson, 95 NY2d 179, 183-184 [2000]). If the Legislature had wanted to set forth "command" as a separate element of the first degree felony murder offense, moreover, it would have done so. [FN10]

The question here is whether due process requires that the command theory be considered by the jury apart from the actual killer theory, and that the jury be unanimous on one theory or the other, even though the Legislature expressly intended that the two coexist in the same subdivision of the statute [FN11]. We conclude it does not.

The Trial Court's instructions comported with due process. In Schad v Arizona (501 US 624 [1991]), the United States Supreme Court analyzed an Arizona statute that defined first degree murder as, among other things, premeditated murder or murder committed during a felony. Justice Souter, writing for a plurality, observed that there is a "point at which differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated as separate offenses" (501 US at 633).

The Schad plurality adopted a case-by-case approach of analyzing the problem, while deferring to the states: "[i]f a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law" (id. at 636). The plurality observed that "[w]here a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has * * * defined as a single crime multiple offenses that are inherently separate" (id. at 640).

Although New York's current first degree murder statute is recently enacted, the term "command," under our law, has its roots in the 1907 Penal Code, which defined a "principal" as "[a] person concerned in the commission of a crime whether he directly commits the act constituting the offense or aids and abets in its commission, and whether present or absent, and a person who directly or indirectly counsels, commands, induces or procures another to commit a crime" (People v Farmer, 196 NY 65, 76 [1909] [Bartlett, J., quoting Penal Code of 1907 § 29 in dissent] [emphasis added]; see also Couser, 94 NY2d at 637) [FN12] . Almost 100 years ago, then, a commander was not only just as culpable as a person who directly committed an offense, but also was indeed a principal.

In a related vein, Schad is instructive in its observation that if two possibilities for proving an element exist, an appropriate inquiry is whether a moral equivalence between the two could reasonably be found (501 US at 644). If so, it is enough to rule out the argument that any hypothetical "moral disparity bars treating them as alternative means to satisfy" the element of a single offense (id.). We have a long history of treating actual killers and commanders as moral equivalents (see Farmer, 196 NY at 70-71) [FN13].

Defendant nevertheless contends that he could have been guilty of only one of the two theories--shooting or commanding--and therefore a different result should obtain. Indeed, he argues that the prosecutor must prove to the jury's satisfaction precisely what occurred as a matter of historical fact. This is so, he claims, for any issue that is critical to the main dispute in the case.

As we sift carefully through the evidence, it becomes apparent that defendant makes much of what is essentially a preliminary fact. "Plainly there is no general requirement that

the jury reach agreement on the preliminary factual issues which underlie the verdict" (Schad, 501 US at 632, quoting McKoy v North Carolina, 494 US 433, 449 [1990] [Blackmun, J., concurring]). Defendant certainly kidnapped the victim--that is undisputed. He took on the mental state required: it was his decision to execute Matos. Thus, whether he personally pointed the gun at the victim's head and pulled the trigger, or whether, handing the gun to Monica, he gave her an order and stood near as she carried it out, the two choices for the jury were not so different that they amounted to any more than alternatives to a common end. Indeed, Justice Souter wrote that in analogous circumstances, "[w]e have never suggested that in returning general verdicts * * * the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one alone" (501 US at 631).

We have, more recently, had occasion to employ this principle in similar circumstances. For example, in People v Rivera (84 NY2d 766 [1995]), the defendant was indicted for second degree murder as a principal. Concluding there was no bar to the People's assertion at trial that defendant acted as an accomplice, we held that the elements of the crime were the same, whether the defendant acted in either role (id. at 771). The facts showed that the victim was shot once and died from the wound. Witnesses saw defendant and two cohorts, all of whom had guns drawn, near the victim. The victim looked at defendant and said, "you shot me" before falling down (id. at 768). Thus, the People were entitled to prove that defendant intended the victim's death, and caused the death either by shooting his gun or by aiding the shooter. To convict, the People had to prove each element of the crime, and defendant's liability was the same whether he acted as either a principal or an accessory (id. at 770-771).

Similarly, in People v Russell (91 NY2d 280, 288-290 [1998]), we concluded that the prosecution was not required to prove which of the defendants fired the lone bullet that killed the victim, when the evidence established that each defendant, embroiled in a gun battle with the others, intentionally aided one another in a mutual combat that caused the death of an innocent bystander. Here, too, the prosecution need not have shown which of the two perpetrators actually fired the fatal shot. [FN14]

C. The Weight of the Evidence of First Degree Felony Murder

Defendant claims that his conviction for first degree felony murder based on either the shooter or the commander theory was against the weight of the evidence because the evidence proved, at most, that he was an ordinary accomplice and was guilty of second degree intentional murder (see Penal Law §§ 125.25[1], 20.00).

The standard of appellate review of the legal sufficiency of the evidence in a criminal trial, of course, is "whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial (Cahill __ NY2d at __, quoting People v Bleakley, 69 NY2d 490, 495 [1987]). Viewing the evidence in a light most favorable to the People, as we must (People v Cabey, 85 NY2d 417, 420 [1995]), we conclude that there is certainly a valid line of reasoning by which a rational person could have reached the conclusion of the jury and that defendant's guilt was established beyond a reasonable doubt. [FN15]

In this capital case, in which a death sentence has been imposed, moreover, we are constitutionally required to review the facts (NY Const art VI §§ 3, 5; People v Davis, 43 NY2d 17, 36 [1977]). Our inquiry here is distinct from our traditional

appellate review for legal sufficiency.

We recently reiterated that "weight of the evidence review recognizes that '[e]ven if all the elements and necessary findings are supported by some credible evidence, the court must examine the evidence further'" (Cahill, __ NY2d at __, quoting Bleakley, 69 NY2d at 495). Thus, "[i]f based on all the credible evidence a different finding would not have been unreasonable, then the appellate court must, like the trier of fact below, 'weigh the relative probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony.' If it appears that the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict" (69 NY2d at 495 [internal citation omitted], quoting People ex rel. MacCracken v Miller, 291 NY 55, 62 [1943]; Cahill , __ NY2d at __). Of course, "[g]reat deference is accorded to the fact-finder's opportunity to view the witnesses, hear the testimony and observe demeanor" (69 NY2d at 495). When "an appellate court performs weight of the evidence review, it sits, in effect, as a 'thirteenth juror'" (Cahill, __ NY2d at __, quoting Tibbs v Florida, 457 US 31, 42 [1982]). We must be sure that "the evidence is of such weight and credibility as to convince us that the jury was justified in finding the defendant guilty beyond a reasonable doubt" (Cahill, __ NY2d at __, quoting People v Crum, 272 NY 348, 350 [1936]).

With these standards in mind, we conclude that the evidence amply supports the first degree murder conviction. There is no question that defendant engineered and carried out the armed kidnapping of Matos, that defendant decided to kill him, handcuffed him, led him down to the basement, and that Matos died of an intentional gunshot wound to the head. No matter which version of defendant's story the jury

credited, it was justified in finding that defendant was squarely in charge of the kidnapping and shooting of Matos.

(i.) The Command Theory

Despite defendant's argument that there was no direct evidence that he told Monica to kill Matos, the circumstantial evidence strongly supports the conclusion that he did. On the day of Matos' murder, defendant was again looking for Janette, with Monica and Victor under his sway. Defendant ordered Monica to turn the car around to confront Matos, he directed her to stop the car and he forced Matos into the car at gunpoint. It was defendant who took Matos into the bathroom and handcuffed him. By then, defendant had made a decision to take "the kid" down to the basement to execute him. Defendant told police that he made this decision and Monica and Victor were following his orders.

Defendant told Sheridan, "I had already made up my mind that I was going to kill him." Defendant stated that he gave Monica the gun, and stood not far from her as she pulled the trigger. Observing that Matos was still alive, defendant placed a plastic bag over his head, further demonstrating his intent [FN16] . The only reasonable inference from these facts is that by word or deed, when he handed Monica the gun, he authoritatively directed her to pull the trigger (see Couser, 94 NY2d at 637).

After the shooting, defendant remained in charge. He explained to Sheridan that he set the alarm for 2:30 a.m. so that, after "partying," they could get up and get rid of the body. He ordered Monica and Victor to go downstairs and wrap the body, [FN17] he told Victor to help them lift the body into the car, he made Victor sit in the back of the car with the corpse (because there was no room in the front seat) and he instructed Monica to drive to an alley near his old job to dispose of the body. When confronted by police with the

theory that Monica was the shooter, defendant claimed surprise that Monica shot Matos in the head. Sheridan later explained that defendant never said he was surprised that Matos was killed. It was reasonable to infer that defendant was surprised that Monica, whom he scorned, carried out the order. He acknowledged in his written statement that everything she did was "out of fear of me and what I would do."

Throughout, defendant maintained his power over the other participants. The jury could easily have inferred that he gave an order to Monica to shoot Matos. The jury gave the evidence its proper weight and we will not disturb that determination.

(ii.) The Shooter Theory

Defendant's written statement to police provided the jury with solid evidence to conclude that he pulled the trigger:

"I handcuffed him behind his back and put him into the bathroom. Me and Monica were trying to figure out what we were going to do with him. I walked him down into the basement. I had already made up my mind that I was going to kill him. In the basement I put a dark handkerchief over his eyes. I shot the dude in the left side of his head as he stood there. The dude fell on the floor. The dude wasn't dead so I put a plastic garbage bag over his head. He was alive for about two and a half hours. The dude just laid there on the floor making sucking noises. After awhile I checked on him and saw that he was dead."

This was a forceful admission leading to the conclusion that defendant shot Matos. True, defendant appeared confused when police asked him about the blindfold over Matos' eyes. Defendant said there was "nothing over the kid's eyes." Of course, defendant admitted covering Matos' head

with a plastic bag after the shooting, and never retracted that portion of his statement, so he must have seen the blindfold, which was shot through and bloodied. The jury may have inferred that he had forgotten about it by the time police asked about it.

We conclude the jury was justified in finding beyond a reasonable doubt that defendant, having decided to execute the victim, directed Monica to shoot Matos or shot the victim himself, and in rejecting his claim that he was merely guilty of second degree murder as an accomplice.

IV.

Defendant maintains that his confession was involuntary and that the introduction, during re-cross-examination of a prosecution witness, of part of it--statements about three other murders--was reversible error. We hold that the confession was voluntary and that, through his trial strategy, defendant opened the door to admission of his statements on other homicides.

A. The Voluntariness of the Confession

Defendant was arrested on the afternoon of November 6, 1996 based on leads Monica gave to police [FN18] . He contends that his will was overborne by the investigators who questioned him, because they allegedly led him to believe that he was receiving a compelling benefit--lenient treatment for family members--in exchange for his confession. This claim is without merit.

Following a Huntley hearing, the court determined that:

> "[D]efendant was properly advised of his Miranda warnings and made a knowing, voluntary and intelligent waiver of those warnings before speaking with the officers. During the ensuing hours of interviews, the defendant made

> numerous inculpatory, spontaneous, oral and written statements to the police concerning the events under investigation. There is no evidence that the police in any way coerced statements made by the defendant, nor induced them by any threats or promises, implied or otherwise, concerning either the charges in this case against the defendant or charges, real or imagined, against his family. The People met their burden in establishing the voluntariness of the statements of the defendant."

An extrajudicial confession is inadmissible against an accused if it is involuntarily made (CPL 60.45[1]; People v Anderson, 42 NY2d 35, 37 [1977]). A confession is "involuntarily made" when it is obtained by a public servant engaged in law enforcement activity by means of any promise or statement of fact which creates a substantial risk that the defendant might falsely incriminate himself (CPL 60.45[2][b][I]).

To determine voluntariness, courts review all of the surrounding circumstances to see whether the defendant's will has been overborne (Anderson, 42 NY2d at 38; Arizona v Fulminante, 499 US 279, 285-286 [1991]). Of course, "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment" (Colorado v Connelly, 479 US 157, 167 [1986]). In our analysis, the hearing court's factual determinations, resting largely upon its assessment of the credibility of the testifying officers, are entitled to deference (see People v Prochilo, 41 NY2d 759, 761 [1977]). In a capital case, moreover, our obligation to weigh the evidence and determine whether the jury was justified in its conclusion beyond a reasonable doubt "extends to the

hearing court's finding as to the voluntariness of the confessions" People v Carbonaro (21 NY2d 271, 274 [1967]). These findings must be reviewed "by the same standards applicable to a verdict of guilt" (id., quoting People v Leonti, 18 NY2d 384, 389 [1966]).

Defendant concedes that the hearing court made "no findings adverse" to him. Under our independent factual review power, we find ample evidentiary support for the hearing court's factual findings. A review of the circumstances here, moreover, shows that defendant's confession was voluntary, and that coercive police activity did not occur.

Defendant was placed in an interview room just after 5:00 p.m. and immediately began asking to speak to the District Attorney, saying he only wanted to "deal with the head man." He told another investigator, who was passing by in the hall, to send in the person handling his case while he still felt like talking. As soon as the homicide investigators entered the interview room at about 5:45 p.m. and introduced themselves, defendant announced that he had matters he wanted to clear up. Investigator Sheridan told defendant that first, he had to read him his rights. Defendant insisted he would tell them everything they wanted to know, but he wanted his family released. Investigator Sheridan gave defendant his Miranda warnings and defendant waived his rights.

Defendant immediately began talking. Before the investigator could put the Miranda card away, defendant stated that he would tell Investigator Sheridan what he wanted to hear, but repeated his demands. Sheridan explained, "I have to know what it is that you want to tell me" and defendant responded, "I will tell you about the homicides." When Sheridan asked for more information, defendant said, "I can tell you about Johvanny." Sheridan asked whether defendant

killed Johvanny (Diaz), [FN19] and defendant admitted that he did, and again repeated that he wanted his family released. Defendant then admitted to killing "a black guy near a milk plant" (Peter Holley) and to killing Matos.

Sheridan then told defendant that he would check on the status of his family members, but he at no time promised defendant that they would receive lenient treatment if defendant confessed. Indeed, defendant confessed to the murders without any prompting from the investigator other than requests for more information. As is obvious from the exchanges, defendant believed that he was in a position to influence the release of his family, acting under a self- created impulse to tell the police "everything" in order to achieve his own objective (see generally People v Gonzales, 75 NY2d 938, 940 [1990]).

Now, defendant claims that police led him to believe that they would limit the charges against his young brother, Victor, in exchange for his confession. By the point at which Victor's charges were discussed, however, defendant had already confessed to the four murders and to sole possession of the gun. The investigators did not promise that they would fulfill his desire; to the contrary, they informed defendant that his brother would not be released. Nor, despite defendant's claims, was there a true quid pro quo involving the dropping of gun charges against defendant's mother and other relatives. Once defendant acknowledged that the gun was his, police released those relatives and informed defendant that they had been set free. This information did not render involuntary defendant's subsequent elaboration about the murders.

Defendant also maintains that the investigators should have been required to tell him that his family's fate was unrelated to whether he confessed, claiming they actively exploited his apprehension about his relatives. Yet the

investigators were not required to dissuade defendant from making incriminating statements, or disabuse him of his fantasy that he could control the circumstances of the interrogation and win the release of his family. We find the reasoning of the Appellate Division in People v Johnson persuasive: "[i]t is not an improper tactic for police to capitalize on a defendant's sense of shame or reluctance to involve his family in a pending investigation absent circumstances which create a substantial risk that a defendant might falsely incriminate himself" (177 AD2d 791, 792 [3d Dept 1991] [internal citation omitted]).

A comparison with the circumstances underlying our decision in Anderson (42 NY2d 35) is instructive. In Anderson , defendant was held for more than 19 hours without probable cause. He was deprived of food and sleep for over 30 hours, questioned by eight or nine officers operating in teams, isolated from friends and family during the entire period, and was not told of his right to counsel until the interrogation had been underway for more than 13 hours (42 NY2d at 39-41). By contrast, in this case, police had ample cause to arrest defendant for the attack on McWilliams. Once in custody, defendant was given his Miranda warnings and waived them. Police offered defendant a cheeseburger, candy, water, coffee and cigarettes, as well as medical treatment. He insisted that he wanted to clear up the crimes, not go to a hospital. Defendant was questioned by two investigators. He was allowed two meetings with Victor and a meeting with Monica. He also was permitted a phone call to his mother, to verify that she had returned home. On this record, there is no evidence that defendant's will was overborne or his capacity for self-determination impaired, and every indication that he spontaneously, aggressively and voluntarily confessed to suit his own purposes. [FN20]

B. The Admission of the Statements about Other Homicides

Defendant claims on appeal that he was deprived of a fair trial through the admission, following re-cross-examination of Sheridan, of his statements regarding other homicides [FN21] . In their direct case, the People initially introduced defendant's statements pertaining only to the Matos killing and the Avenue D incidents. The Trial Court ultimately permitted the People to introduce defendant's entire confession, including the statements about other homicides, to rebut the claim that defendant falsely confessed in an unreliable interrogation to killing Matos to cover for his wife. The Trial Court explained that the jury needed to hear the entire confession to discern " the truthfulness of the [Matos] statement and the motivation for the defendant to give the various versions" of it. In our view, defendant, in the particular circumstances of this case, opened the door to this evidence. [FN22]

(i.) Pretrial Motion Practice

On July 31, 1998, more than three months before trial, the prosecution informed defense counsel by letter that it did not intend to offer testimony in its direct case regarding other murders "unless the door is opened through argument, cross-examination or presentation of evidence by the defendant." The People warned that if defendant raised voluntariness claims "which in any way relate to what took place during the times the defendant was making statements regarding the Diaz, Toro or Holl[e]y murders," they would seek to present rebuttal evidence concerning the interrogation as a whole.

In an August 10, 1998 letter in reply, defense counsel acknowledged:

> "We recognize that redaction of evidence of the prior homicides necessarily creates gaps in the time-line of the interrogation. * * * Please be assured that we will not exploit these gaps by arguing to the jury that these gaps reflect the time when impermissible pressure was brought to bear upon [defendant]."

On August 31, 1998, defendant moved for a pretrial order redacting from his confession any reference to the other homicides. The People responded that for the first hour and three-quarters of the interrogation, defendant spoke about four murders intertwined with his repeated request that police release his family. The People offered to structure their direct examination to eliminate all conversations regarding "the four bodies and the defendant's demands to have his family released." The prosecution again warned defendant against opening the door to his admissions through, for example, questions about time gaps in the confession or alleged promises made by police about his family's release. The prosecution maintained that it would be unfair to require the investigators to answer questions about any alleged promises without being able to explain to the jury "the entire substance of that conversation."

After extensive oral argument, the court told defense counsel that many issues in the case could open the door to the full confession. To avoid that outcome, the Trial Court offered defense counsel the opportunity to submit a "wish list " of suggested redactions from the confession. The court additionally invited defense counsel to submit proposed questions for cross-examination, so that the court could, in advance, point out areas that might be in the danger zone. Plainly attentive to the potential for prejudice to defendant, the court stressed that the other statements could be relevant

to issues in the case, requiring examination of the "prejudicial or probative value of the statements themselves."

Despite the Trial Judge's suggestion, defendant chose not to provide a list of proposed redactions. Thus, without benefit of a proposal from defense counsel, the court issued its pretrial order:

> "The People * * * point out that during the time period that Inv. Sheridan and Sgt. Gropp spoke to the defendant, there was intertwined conversation regarding other issues dealing with the release of his family.
>
> * * *
>
> "The prosecution, however, is concerned that the period of time taken up regarding the conversations on the Diaz, Toro and Holley murders may be raised by the defense on the issue of voluntariness on the Matos-Rodriguez murder, which is the subject of this trial. The People wish to reserve the right to question the investigators on re-direct examination should the defense "open the door" to an enlarged area of questioning.
>
> "The Court is sensitive to the People's request but feels there is no way to make a definitive order in advance of the trial on the People's request. Therefore, it is the direction of the Court that the People should structure their direct examination regarding the conversations between the defendant and the police from 5:45 p.m. to 7:30 p.m. on November 7, 1996 [sic] in a way in which all conversations regarding references to "1 bodies" and the defendant's demand to have his family released are eliminated. The Court will allow leeway to the

> prosecution by way of leading questions on these issues. The Court will preserve the People's right to challenge the defense cross-examination and to raise the issue as to whether the defendant has raised any issue as to the voluntariness of the statement relating to what took place during the times the defendant was making statements regarding the Diaz, Toro, and Holley murders. " [FN23]

(ii.) The Defense Strategy

Despite knowledge that the People were prohibited from eliciting the chronology of the confession or defendant's demands to have his family released, and despite the Trial Court's repeated warning that the preclusion order would be revisited based on what ensued at trial, the defense opened with its own theory explaining the Matos statement: that defendant was motivated to confess in an "obvious and elaborate ritual to cover for his wife." In the opening, defense counsel told the jury that defendant's statement "was nothing less than Mr. Mateo taking everything his wife did onto his shoulders. " Disregarding his own earlier assurance that he would not exploit the time gaps, counsel also urged the jurors to "pay close attention to the circumstances and chronology of the statements."

Through the cross-examination of police witnesses, defendant's strategy emerged. Questions about the extent of his leg injury, the timing of events in the interrogation and his concern for his family (which the People had been barred from explaining) began painting a picture that defendant, in significant pain throughout a very protracted nighttime interrogation, confessed to Matos' murder in an unreliable manner. By contrast Sheridan, the People's main witness on

the Matos murder, testified in the truncated fashion directed by the pretrial order.

Sheridan testified that defendant first admitted to shooting Matos himself, then changed his story and claimed Monica did it, then went back and forth several times, and even claimed that Monica did it, but he would take the blame because he was a "king" and wanted the death penalty. After these various oral admissions, defendant again asserted in his written statement that he pulled the trigger. By contrast, he never wavered from his assertions that he decided to execute Matos and that Monica was following his orders.

Sheridan also explained that after he completed taking the Matos statements, his partner Sergeant Gropp took defendant's written statements about Avenue D. When the People finished their direct examination of Sheridan, the defense sought rulings from the Trial Court about eight areas of cross-examination of the investigator concerning: 1) the time gaps in the interrogation, 2) alleged promises that defendant's family would be released, 3) alleged promises that police would reduce Victor's charges, 4) alleged promises about Monica's charges, 5) defendant's concern for his family's safety, 6) the substance of what defendant learned about Monica's statements, 7) the substance of defendant's taped telephone call to his mother (in which he said he "took four bodies"), and 8) defendant's physical condition during the interrogation.

The Trial Court advised defense counsel that, in light of this plan of attack:

> "I think that the redactions that have been agreed to up to this point by the People on the direct would not continue through the cross-examination. If I'm going to be telling the jury that in evaluating the testimony of

> Investigator Sheridan concerning the statement attributed to the defendant, one of the things I'd be telling them is they should be looking at the totality of the circumstances, everything that happened. And in this case, * * * the picture is a picture of a defendant who is attempting to take control of the interview process and asserting very vigorously conditions that he requires as conditions precedent to his talking to the officers from the moment of calling Investigator Sennett and telling him to get somebody in there to talk to him, setting conditions for his family's release, setting conditions for what charges would be placed against his family, specifically Victor Cordero."

The court agreed to allow defense counsel to ask general questions about the time gaps and defendant's injury, but again warned that if counsel strayed into the areas of voluntariness and reliability, then the door would open to the entire confession. Defendant's demands for the release of his family, the court determined, were ongoing negotiations and their unveiling would open the door to the People's rebuttal. Defense counsel could ask general questions about Victor's role at Avenue D, but any negotiations about either Victor's or Monica's charges would open the door to rebuttal. Indeed, the court reminded defense counsel that Monica had told investigators that defendant was responsible for "several other bodies."

Inquiry about defendant's meetings with Victor and Monica, the court concluded, would also require explaining defendant's motivation for making admissions, and the jury would then need to consider the full circumstances of the confession to evaluate voluntariness and reliability [FN24].

The court again warned that if defense counsel was not careful, "the doors could fling open."

On cross-examination, defense counsel quickly returned to the themes of the time gaps and defendant's injury, reiterating that the interview began at 5:45 p.m., that a meeting with Victor took place at 8:00 p.m., and a second meeting with him was "much, much later," and that defendant was limping. Cross-examination was then interrupted because defendant developed the flu. When the trial resumed, defense counsel asked for three more rulings. Specifically, counsel asked if he could cross-examine the investigator about: 1) defendant's meeting with Monica, 2) defendant's second meeting with Victor and 3) the phone call. The court repeated that the phone call was still off-limits because of its reference to "four bodies," but determined that the defense could ask generally about the meeting with Monica, although not its substance. The defense withdrew the request to ask about the second meeting with Victor, because during that conversation, defendant told Victor that he would take the rap for "these murders." Yet immediately after those rulings, defense counsel asked Sheridan about the second meeting with Victor, and whether defendant had confided that "this stemmed from his personal relationship with Janette and Monica; is that correct? Was there anything of that nature discussed?" The investigator answered, "I don't believe so."

The defense also questioned Sheridan whether the written Matos statement was " typed out in a single session" or whether there was a "break" before it was finished. Counsel persisted, asking, "But the narrative was done and then you asked him is there anything else you want to say? And then he added a final sentence or two?" The investigator responded, "Yes. That's it. " Defense counsel additionally established that defendant added a second, handwritten addendum to that

statement at approximately 2:00 a.m., more than eight hours after the interrogation began. He further elicited that defendant expressed concern for his family members "throughout" the interrogation.

Defense counsel completed cross-examination and offered to withdraw his request for a voluntariness instruction after the People argued that any such request would "open up the questioning of Investigator Sheridan to the entire contents of the interview" on redirect. The court asked defense counsel for clarification, noting that it had:

> "some concerns about the questions that have been asked up to this point about the physical condition of the defendant, because it's not asked presumably just to be out there. It's asked to perhaps give the impression to the jury that Mr. Mateo was under such a physical disability because of the wound to his leg that he spoke with the officers. And certainly the time of the interview is left hanging there. The time of the statement being signed. And all that that [sic] goes to it. I think we're asking the jury to speculate."

Defense counsel claimed that he had "assiduously avoided reference to physical condition in my cross-examination" of Sheridan. The court, however, pointed out that "everybody that had a passing view of your client was asked if he was limping or seemed to be bothered by a wounded leg." Defense counsel then promised not to "get into the classic voluntariness issues."

As for a truthfulness charge, the court observed:

> "[T]his issue about truthfulness of the statement, reliability of the statement, any issue that could be phrased to the jury as asking them to, members of the jury, try to read between the lines about

> what's going on here, those are issues that I'm very concerned about, and I guess I want to alert all of you to that. If the defense is really withdrawing this and that these issues are not going to be asked of Investigator Sheridan or any other officer, then I would expect they not be referenced either. Is that clear to everybody?
> "[THE PEOPLE]: Yes, Your Honor.
> "[DEFENSE COUNSEL]: Yes, Your Honor."

On redirect, the prosecutor posed a few questions about defendant ordering Monica and Victor to follow his commands, and about the decision to kill Matos. On re-cross, defense counsel asked about defendant's assertion that he was "going to take the rap for this or take the blame for this." Counsel asked whether Sheridan "pressed him on the matter" and finally, asked whether defendant stated it was "because he wanted [the] death penalty." The prosecutor objected on the ground that the questions were beyond the scope of the redirect.

The court asked counsel to approach, and after a 15-minute recess in which it reviewed Sheridan's report on the interrogation, observed:

> "I think all of this goes to truthfulness of the statement and negotiations on the statement. If you are going to be arguing that to the jury, on the issue of whether the statement itself is truthful and the motivation for changes, this is what it's about it seems to me. It is so interwoven, at least the setting of this police report, the way that it's couched in this police re-port, it starts out from the moment the rights are read that Mr. Mateo is setting the agenda for how the statement is going

> to be taken, under what conditions, and even what subjects are going to be covered. I can understand, based on what your defense is -- and I guess this is one of the things that we all talked about at various stages in the case -- that we wouldn't know until we were here completely what tenor the case would take. I understand also why you haven't, up to this point, up to the requests for the charge, really indicated what it was that you were going to be saying at the trial, but now we are here and if there is an issue about the truthfulness of the statement and the motivation for the defendant to give the various versions that have been described by the witness, then I think it all comes in, the entire testimony about the other homicides, the contacts with the family, the belief that others may have been informing on him, I think that all comes in. To say that it doesn't, I think, again, asks the jury to determine the truthfulness of the statement without knowing what all the circumstances surrounding the taking of the statement were."

The court concluded that defendant's motivation for making the written statement "involved other criminal acts that he faced" and was interwoven with his desire to see that members of his family were released from police custody [FN25]. Aware of the potential prejudice to defendant, the court acknowledged that it would:

> "inform the jury that the information concerning other homicides is not offered as an indication that the defendant committed this homicide for which he is charged or any of the crimes for which he is charged, but it's offered on the issue

of the truthfulness of the statement and what motivation, if any, Mr. Mateo may have had to alter his description of the events."

Sheridan then testified concerning defendant's full confession, followed by an instruction warning the jury that the testimony was admitted for "a very limited purpose." The Trial Judge explained that the statements about other homicides were not to be considered as any indication of defendant's propensity for committing crimes. Rather, the court charged, the jury should consider the probability or improbability of the Matos statements and what motivation, if any, defendant had to make them, and should reflect on the interrogation as a whole to assess the truthfulness of the Matos statements. In its final charge, the court repeated these instructions to the jury.

(iii.) Analysis

It is well settled that evidence is relevant if it has any "tendency in reason to prove any material fact" (People v Alvino, 71 NY2d 233, 241 [1987]). All relevant evidence is, moreover, admissible at trial unless barred by some exclusionary rule. Even where relevant evidence is admissible, it may still be excluded in the exercise of the Trial Court's discretion if its probative value is substantially outweighed by the potential for prejudice (People v Scarola, 71 NY2d 769, 777 [1988]). When a party "opens the door" during cross-examination to excluded evidence, the opponent may seek to admit the excluded evidence in order to explain, clarify and fully elicit the question that has been only partially exposed on cross-examination (see e.g. People v Rojas, 97 NY2d 32 [2001]; People v Regina, 19 NY2d 65, 78 [1966]) [FN26]. "The 'opening the door' theory must necessarily be approached on a case-by-case basis" (People v Melendez, 55 NY2d 445, 452 [1982]).

There is no doubt that this interrogation, as a whole, was probative of a material issue in the case--defendant's motive for confessing to the Matos murder--and could aid the jury in assessing the truthfulness of that portion of defendant's confession. There is also no doubt that it was defendant himself who made his motive for confessing an issue in this case. Eschewing the court's offer before trial commenced to make selective redactions from the statements, and to pre-approve areas for cross-examination, the defense knowingly embarked on a dangerous strategy that during trial was periodically revisited by the court and the parties, and ultimately went too far.

The defense, in its opening statement, argued that the jury should acquit defendant of first degree murder because he confessed, in a lie, to cover for his wife. Four areas of testimony then became troubling to the Trial Judge. First, after Sheridan's direct testimony, the jury knew simply that defendant confessed to the killing of Matos. What was omitted was defendant's stage- setting declarations that he would give the police "everything" in exchange for what he wanted. Second, the jury was left with the impression that defendant was interrogated from 5:45 p.m. to 2:00 a.m. concerning one murder and the Avenue D incidents. During that time, he actually spoke at length about four murders as well as two brutal home invasions at Avenue D, intertwined with demands for the release of his family.

Third, as the Trial Court emphasized, the jury heard repeatedly that defendant had a bandaged leg wound and was limping. What was beyond the jury's knowledge was the fact that, despite his injury, defendant refused offers of medical treatment because he insisted on first clearing up the four homicides [FN27] . Finally, having learned in the opening that defendant was motivated to confess in an "obvious and

elaborate ritual to cover for his wife," the jury heard that defendant and Monica were involved in one murder. They did not know that defendant also confessed to three murders having nothing to do with Monica. Nor did they know that Sheridan told defendant early on that Monica was facing serious charges and defendant did not care that she "had been caught" and would not be released.

Compounding the problem of the distorted picture before the jury was the defense tactic of claiming it had no intention of opening the door, then persistently nudging it ajar. Incrementally, it became apparent to the Trial Court that, for the jury to assess defendant's claim that his admission to the murder of Matos was a lie, it had to view that statement in its extraordinary context. The final, withdrawn defense question--whether defendant claimed that he confessed because he wanted the death penalty--underscored for the court and highlighted for the jury the enigma of defendant's motivation for confessing to the Matos murder: was it to cover for Monica, to get the death penalty, or something else? [FN28]

As the court well knew, but the jury did not, the People had been precluded from presenting defendant's actual motivation for confessing--his belief that he could set the terms of his interrogation, claim responsibility for four murders and win his family's release. The defense cannot, on one hand, claim that defendant is innocent of first degree murder and lied to cover for his wife, and on the other, abuse the preclusion order and bar the People from refuting that claim. In effect, "the defense converted the shield of the preclusion order into a sword by arguing that the People should not be allowed to supply" defendant's true motive for confessing (Rojas, 97 NY2d at 39). In these unusual circumstances, the jury was entitled to decide whether the defense claims rang true in context.

At bottom, the Court divides over what amounts to a fundamental disagreement about the trial record in this case. For an appellate court, the best evidence of who said what is in the transcript and we therefore have quoted extensively from it in an effort to show how the issue regarding defendant's statements developed during trial--the pivotal inquiry. One prominent example of our difference is the claim that it was the People, and not the defense, who "opened the door" (Smith dissent at 20, 21, 25). In fact, Sheridan testified on direct on November 16 and 17, 1998, on pages 14626-14702 of the record, and we are unable to find--until defendant's cross-examination --any testimony bringing out the fact that defendant confessed in an eight-hour interrogation, about the early morning hour when the interview ended, or about its chronology.

The Trial Court, of course, observed this evolution of the issue firsthand before making its ultimate ruling that the potential for prejudice to defendant did not substantially outweigh the probative value of the full confession. This ruling was made not sua sponte , or in a vacuum, but after repeated admonitions to defense counsel, several quoted verbatim in this writing. To diminish the potential for prejudice, moreover, the court instructed the jury concerning the limited purpose for which the clarifying evidence was being admitted. Unlike the Rosenblatt dissent, we will not disregard the Trial Court's "explicit emphasis twice, by cautionary instructions to the jury" that the full confession was introduced only so that the jury could consider the truthfulness of the Matos statement and defendant's motivation for making it, and not as proof of the charged crimes (see People v Till, 87 NY2d 835, 837 [1995]).

Should the court have made a more circumscribed ruling, permitting introduction of the other statements in a

redacted form to limit further the potential for prejudice? That surely seems a better option. Indeed, the court had given that option to the defense prior to trial, but the defense ignored it. At trial, when the court ruled the statements admissible, the defense never suggested--as both dissenters do today--that they be tailored so that Sheridan would merely testify that defendant had confessed to "other crimes." [FN29] But even such a ruling might have left the jury to speculate about what "other crimes" would require an eight-hour confession, or be so compelling that they would motivate defendant to forego medical treatment for a bullet wound.

Of course, "[t]here is no litmus paper test for determining when the probative value of the evidence outweighs its potential for prejudice" (People v Ventimiglia, 52 NY2d 350, 359 [1981]) [FN30]. In Ventimiglia , we determined that "important in the weighing process will * * * be how the evidence comes into the case, that is, whether at the instance of the People initially, or in rebuttal to a defense offered by defendant" (id. at 360).

Viewing the question of prejudice in the context of the trial, this was a case in which the other statements came in as rebuttal to the defense theory. As the Trial Court observed, "[t]his isn't an identification case. This is a statements case" in which defendant's guilt of intentional second degree murder was uncontested. By the time these statements were received in evidence, the jury had already heard the details of the Matos execution from defendant's own words to Sheridan. Additionally, they heard uncontested evidence of defendant's crimes at Avenue D, through the testimony of the people who actually fended him off. And they heard that he had confessed in a lie to protect Monica.

But the law had altered the landscape for the People by excluding probative evidence bearing on the truthfulness and

reliability of defendant's admission to the Matos killing, and defendant sought to exploit that pretrial ruling. In the tangible circumstances presented, where the main issue for the jury was whether defendant was guilty of second degree murder as an accomplice, or of intentional first degree murder as the shooter or commander, we hold that the Trial Court acted within the bounds of discretion in its ultimate conclusion--resolving the issue explicitly identified at the outset of the trial--that the probative value of the full confession was not substantially outweighed by its potential for prejudice to defendant.

Finally, six of us conclude that, on this record, the admissions about other crimes were probative of a material issue in the case, and that the door was opened by the defense, to one degree or another. All seven of us remain deeply committed to the just, faithful and equal application of the law, irrespective of guilt. In so doing, we need not examine the Trial Court's ruling through the lens of what might have been one of several appropriate responses in the heat of trial. Rather, the result reached here rests on a succession of factors particular to this case, beginning with defendant's staging of his statements to the police and the favorable pretrial order he procured, and ending with the skewed picture that his abuse of that order produced--in short, turning the protective shield into a sword. That was impermissible before this case, as it continues to be after.

As we concluded in Harris, despite the success of defendant's Jackson challenge to his sentence (98 NY2d at 496-497), his conviction for first degree murder and the other offenses stands, and we therefore affirm it. As a consequence, defendant's remaining contentions regarding his sentence are academic.

Accordingly, the judgment of County Court should be

modified by setting aside the sentence of death and remitting to County Court for resentencing in accordance with CPL 470.30(5)(c) and Penal Law §§ 60.06 and 70.00(5) and, as so modified, affirmed; the appeal from County Court's order dated March 11, 1999 should be dismissed.

G. B. Smith, J. (dissenting):

Defendant's confessions to the murders of Johvanny Diaz, Joangel Toro and Peter Holley were improperly admitted at trial. The evidence had no relevance to any material issue in the Matos case and tended only to demonstrate defendant's violent propensity. Nor did the defense open the door to the admission of those confessions. The evidence does not support the Court's conclusion on this issue. The record illustrates that the defense did not raise any issue warranting the introduction of the confessions related to the three uncharged murders. The evidence therefore should have been excluded pursuant to People v Molineux (168 NY 264 [1901]) and its progeny. I therefore dissent and vote to reverse defendant's conviction and remand for a new trial.

As an initial matter, as I have stated in other capital cases this Court has heard since the reinstatement of the death penalty, because the penalty of death is qualitatively different than any other type of sentence a court may impose, both in its severity and its finality, there is a heightened need for reliability (see Woodson v United States, 428 US 280, 305 [1976] [plurality opinion]; see also Caldwell v Mississippi, 472 US 320, 340 [1985]; Beck v Alabama, 447 US 625, 638 [1980]; People v Harris, 98 NY2d 452, 497-506 [Smith, J., concurring in part and dissenting in part]; People v Cahill, 2003 WL 22770167 [2003] [Smith, J., concurring]. "Any error that increases the risk of an unwarranted conviction, which would

bring the defendant a step closer to death, must be subject to the heightened reliability standard" (People v Harris, 98 NY2d at 503 [Smith, J., concurring in part and dissenting in part]); State v Martinez, 132 NM 32, 36, 43 P3d 1042, 1046 [2002] [citations and internal quotations omitted] ["Because of the gravity and irrevocability of the death sentence, and the grave injustice that would accompany an erroneous execution, error in a capital case is more likely to rise to fundamental error than the same error in a non-capital case. In a capital case, a legal defense often represents the only lawful mechanism by which a defendant may preserve his or her life. Any error that encumbers that mechanism unfairly debilitates the defendant's claim to life, magnifies the risk of an erroneous execution, and necessarily constitutes a circumstance that shocks the conscience and implicates a fundamental unfairness within the system that would undermine judicial integrity if left unchecked"]). Indeed, as this Court stated in Harris, "We are careful to note * * * that capital trial courts should exercise great caution in making discretionary determinations. * * * The stakes are high for all involved" (People v Harris, 98 NY2d at 490).

Responding to defendant's appellate argument challenging the constitutionality of the death penalty based on the risk that an innocent person may be executed, the People argue, "Sometimes, despite all the steps taken by the Legislature and the Judiciary to assure that such mistakes are few and far between, human and institutional fallibility may result in a wrongful conviction. And even if it has not happened in the last thirty years and certainly will not happen here, it is possible that an actually innocent person will someday be executed." Despite this observation, no judge or lawyer can accept the possibility of the conviction and execution of an innocent person. It is therefore imperative for

the judiciary scrupulously to honor the defendant's constitutional right to a fair trial and to apply carefully the evidentiary rules established for the protection of the innocent. In this case, however, even without regard to heightened scrutiny standards, the admission of evidence that defendant had committed three murders in addition to the crimes for which he already stood accused was clearly erroneous.

It should be clear that the difference between the Majority and the dissent is not simply a different reading of the record. One difference is that the People never claimed that the defendant had opened the door to testimony concerning defendant's confession to three unrelated murders and the trial court did not base its decision to allow that evidence on its conclusion that the defendant had opened the door, but the Majority itself concludes that the defendant opened the door. The second difference is that the Majority does not address the defendant's main argument for moving for a mistrial and one of its contentions on this appeal, namely that the introduction of the testimony concerning three unrelated murders violated People v Molineux.

A.

In addition to confessing to the two burglaries at the Avenue D apartment building and the murder of Juan Matos, defendant also told Detective Sheridan that he had killed Johvanny Diaz, Joangel Toro and Peter Holley. Describing the first two murders, defendant confessed that he and his cousin "Moncho" had been hired by a drug dealer named Charlie to shoot Johvanny Diaz in the knees and to steal his jewelry because Diaz owed Charlie money. Defendant and Moncho were to be paid $10,000 for the shooting. They looked for Diaz and found him on Jay Street. After they unsuccessfully

attempted to purchase drugs from Diaz, he walked across the street to use a pay telephone. Joangel Toro approached Diaz while he was on the phone and stood near him. Defendant and Moncho then put nylon masks over their faces and walked over to Diaz. Moncho pointed a .45 caliber gun at Diaz. When Toro tried to walk away, defendant pointed a .38 caliber gun at him and forced him to return. Moncho then shot Diaz in the face, which prompted defendant to start shooting at Toro. After shooting at both victims numerous times, defendant and Moncho fled the scene.

Defendant then recounted to Detective Sheridan the murder of Peter Holley. According to defendant, his cousin had come to him and said that a man threatened him with a knife and stole his bicycle and jewelry. Defendant obtained a single-barrel shotgun and drove through the streets with his cousin to find the man. When they approached the area of the robbery, his cousin saw his bicycle on the side of the road. His cousin identified and pointed out Holley as the man who robbed him, exited the car and retrieved his bicycle. Defendant then drove up to Holley, who was trying to get into his own parked car, shot him in the head and drove away.

B.

Prior to trial, the prosecutor informed defense counsel that the People would not seek to introduce defendant's confessions to the three uncharged killings unless the defense opened the door to the evidence. In particular, the prosecutor warned that he would seek the introduction of all of the defendant's confessions if the defense challenged the voluntariness of the statements or sought to prove that defendant's confessions were induced by promises made to him by the police. The prosecutor also noted that any attempts by the defense to exploit the gaps in the timing of the

interrogation during which the admitted confessions were obtained would open the door to the remainder of defendant's confessions. Defendant's attorney agreed to avoid those areas during his argument and in the course of the cross-examination of the People's witnesses. Counsel, however, maintained that challenges to the truthfulness of defendant's confessions regarding who actually shot Matos would not open the door to the additional murder confessions.

During his opening statement, defense counsel made no attempt to challenge the voluntariness of defendant's confessions. As is relevant here, defense counsel argued that at the core of the case lay two questions: "Who did what? And why they did it?" Counsel informed the jury that defendant "gave an oral and a written statement to Investigator[s] Sheridan and Gropp." He urged the jury to "pay close attention to the circumstances and chronology of the statements." Counsel went on to argue that in his written statement, defendant attempted to take the blame for his wife's actions because he felt responsible for Matos's death. The prosecutor at no time suggested to the court that arguments made in defense counsel's opening statement opened the door to defendant's confessions concerning the three uncharged murders or that the disclosure of those confessions was warranted.

What the defendant indicated in the opening statement was that the defendant did not kill Matos and did not order his wife to do so. Thus his strategy, stated in the opening, was to blame Szlekovics for the murder and to prevent a conviction for first degree murder. He stated, "This killing, as tragic as it was, was at the unguided hands of Monica Szlekovics, a woman capable of acts of violence, especially when it involved a perceived threat with her relationship with Angel Mateo."

Following the direct examination of Investigator Terrance Sheridan, the parties and the court discussed the areas which defense counsel intended to explore on cross-examination and the arguments he intended to advance based on the testimony. The court informed defense counsel that a challenge to the voluntariness of defendant's confessions based on any alleged promises, as well as a challenge to the reliability of his confessions based on the fact that he had an injured leg at the time of the interrogation or due to some other exerted influence, would open the door to the evidence that he had confessed to the three uncharged murders. Based on the court's ruling, counsel withdrew his previous request that the court give the jury an instruction on the voluntariness or the reliability of defendant's statements [FN31].

At that point, counsel informed the court that he intended to challenge only the truthfulness of defendant's confessions. When asked for clarification on this strategy, counsel explained:

> "Whether the statement itself is a reliable rendition of what happened that night. It was taken down according to his wishes and it was not true in its ultimate. Your honor, we have a dilemma where there's an oral statement and a written statement that essentially contradict themselves as to an essential fact. One will be reliab[le], one will not be."

The court then responded, "You know, we have an oral statement and a written statement that are contradictory to each other on their face." The court nevertheless warned defense counsel that if he sought to explain the contradictions by way of arguments that challenge the voluntariness of the confessions or the reliability of his statements based on his injury, it would open the door to the other murder

confessions.

During the cross-examination of Sheridan, defense counsel elicited that Sheridan took a written statement from defendant on the late evening of November 6, 1995 or early morning hours of November 7. Sheridan further testified that defendant met with his brother, Victor Cordero, at 8 p.m. and again at a later time in the evening [FN32] . Counsel also elicited that defendant's second handwritten addendum to his written statement was made at 2:00 a.m. or possibly later.

Following up on testimony educed during Sheridan's direct examination, counsel also elicited that defendant had orally stated that his wife had shot Matos. Sheridan testified that defendant told him that when the time came for his confession to be committed to writing he intended to say that he was the one who shot Matos. Defendant said that he intended to take the blame for the shooting because he believed that the incident was entirely his fault and because he wanted the death penalty. According to Sheridan's testimony, defendant stated that he would rather die than spend "a hundred years" in prison.

After defense counsel's cross-examination of Sheridan, the People made no argument that counsel opened the door to the other statements and did not otherwise seek to introduce the remainder of defendant's confessions. Neither did the court state that counsel's questioning warranted the introduction of the other murder confessions. Defendant's attorney assured the court that he intended to argue that defendant's admission that he had pulled the trigger killing Matos was not true, but that he would not argue that the confession was involuntarily extracted.

Following a re-direct examination and re-cross examination of Investigator Sheridan on other matters, the prosecutor informed the court that he intended to conduct

further re-direct examination. At no time did the prosecutor argue that questions asked on re-cross examination opened the door to defendant's confessions regarding the three uncharged murders.

However, in a sua sponte ruling, the Trial Judge stated that any challenge to the truthfulness of defendant's confessions and any argument as to the reasons that he altered his version of the Matos killing required the introduction of his statements regarding the three uncharged killings. The court reasoned that defendant's references to all four killings were so intertwined that the jury's assessment of the truthfulness of defendant's statements must include the confessions to all of the killings. The court added that defendant's statement that he would rather be sentenced to death than serve a hundred years in prison required the jury to be made aware of the other murders so that the statement would make sense.

Defense counsel vehemently objected to the introduction of the uncharged murders, noting that the only way to defend the capital murder charge was to challenge the veracity of defendant's confessions. The court nonetheless maintained that the jury needed to consider all of the confessions in order to evaluate the credibility of defendant's rendition of the Matos killing.

The People conducted a further re-direct examination of Sheridan, at which time he testified about defendant's confessions to the additional killings and read to the jury defendant's written statements which described each of the killings in full detail. Sheridan also testified regarding his independent investigation into the murders of Diaz and Toro. Specifically, Sheridan testified that on the morning of August 6, 1995, months before defendant's confessions, he had been called to Jay Street where he saw the lifeless bodies of Diaz

and Toro. They were lying on top of one another in a pool of blood at the base of a pay telephone with its receiver dangling off the hook. Diaz had been pistol whipped several times with a large caliber handgun and had sustained four gunshots wounds to his head and two to his upper body. Toro had been shot once in his head and twice in his upper body.

Following Sheridan's testimony, the court gave a limiting instruction informing the jury that the evidence was not offered to show defendant's propensity to commit the crimes charged in the indictment, but to illustrate the circumstances of the confessions so that the jurors could evaluate their credibility. The court subsequently instructed the jury not to consider the truthfulness of the other murder confessions. Thus the Court allowed evidence of the prior murders not because defendant had opened the door but because of the trial court's own conclusion that they were necessary to show whether the defendant was telling the truth in his confessions to the Matos killing.

Thereafter, in a written application, defendant moved for a mistrial based on the admission of the evidence of the three uncharged killings. Specifically, defendant argued that the other murder confessions should have been excluded under traditional Molineux principles because the evidence was not probative of any material issue in the case other than defendant's propensity toward violent behavior. Defendant claimed that since he had already agreed not to challenge the voluntariness of his statements, the other murder confessions were not relevant to any issue related to voluntariness. He also argued that the evidence was not relevant to assess the truthfulness of his statements concerning the crimes charged. Defendant further argued that the prejudicial value of the evidence outweighed its probative effect.

In response to the motion, the People argued that the

admission of defendant's other confessions was the result of extensive conferences with the court regarding the circumstances that would warrant the introduction of the evidence. The prosecutor argued that the evidence was probative of the voluntariness of defendant's admitted statements and that it was necessary to refute the defense contention that he had given a false confession in order to secure his family's release from jail.

In an oral decision, the Trial Court denied the motion, relying on its previous conclusions. The Court stated that the evidence of the other murder confessions was relevant to address issues raised about the voluntariness and the truthfulness of defendant's statements, especially as they related to promises made by the police and their negotiations with the defendant for his statements.

C.

It is fundamental that evidence concerning a defendant's uncharged crimes or prior misconduct is not admissible if it cannot logically be connected to some specific material issue in the case, and tends only to demonstrate that the defendant was predisposed to commit the crime charged (see People v Hudy, 73 NY2d 40, 54 [1988]; People v Alvino, 71 NY2d 233, 253 [1987]; People v Ventimiglia, 52 NY2d 350, 359-60 [1981]; People v Allweiss, 48 NY2d 40, 46 [1979]). First pronounced by this Court in 1901 in People v Molineux (168 NY 264), this evidentiary rule is widely-recognized by state courts throughout this country and the federal courts have steadfastly adhered to it as codified by FRE Rule 404(b) [FN33]. To be sure, long before our decision in Molineux, this rule, like many other rules of evidence followed in this country, had its roots in 16th century England (see Joan L. Larsen, Of Propensity, Prejudice, and Plain Meaning: The

Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b), 87 NW U L Rev 651, 667 [1993]; see also Wigmore, Evidence, § 58.2 at 1213-14 [Tillers revised edition 1983]). As this Court has recently noted, the progeny of Molineux has preserved its basic foundation: "a criminal case should be tried on the facts and not on the basis of a defendant's propensity to commit the crime charged" (People v Rojas, 97 NY2d 32 at 36).

The evidence of a defendant's prior bad acts is "objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal -- whether judge or jury -- is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge" (Wigmore, Evidence § 58.2, at 1212; see also Michelson v United States, 335 US 469, 475-76 [1948]; People v Rojas, 97 NY2d at 36-37 ["propensity evidence invites jury to misfocus, if not base its verdict, on a defendant's prior crimes rather than on the evidence -- or lack of evidence -- relating to the case before it]; People v Hudy, 73 NY2d at 55; People v Ventimiglia, 52 NY2d at 359; People v Allweiss, 48 NY2d at 46 ["The rule is based on policy and not on logic. It is meant to eliminate the risk that a jury, not fully convinced of the defendant's guilt of the crime charged may, nevertheless, find against him because his conduct generally merits punishment"]). Therefore, "[w]here * * * the evidence proves only criminal propensity and serves no other function in demonstrating defendant's guilt of the crime charged, there is no legitimate basis for its admission. No degree of care, in assessing its value and possible prejudice and in giving cautionary instructions, can render it otherwise" (People v

Alvino, 71 NY2d at 253]).

Of course, evidence relevant to some material fact in the case, other than the defendant's criminal propensities, is not to be excluded merely because the evidence may reveal that defendant had committed other crimes (see People v Ventimiglia, 52 NY2d at 359 [the rule's "policy of protection against potential prejudice gives way when evidence of prior crime is probative of the crime now charged"]; People v Allweiss, 48 NY2d at 46-47). Thus, evidence of defendant's uncharged crimes or bad acts may be admitted to demonstrate motive, intent, the absence of mistake or accident, identity or a common scheme or plan (see People v Molineux, 168 NY at 293). The list is merely illustrative and not exhaustive (see People v Rojas, 97 NY2d at 37; People v Ventimiglia, 52 NY2d at 359; People v Santarelli , 49 NY2d at 248). Relevant here, this Court has recognized that evidence of a defendant's prior crimes may be introduced to refute a defendant's claims at trial (see People v Alvino, 71 NY2d at 246; People v Ingram, 71 NY2d 474, 479-80 [1988]; People v Santarelli, 49 NY2d at 248).

Determination as to the admissibility of evidence of a defendant's uncharged crimes or prior bad acts requires a two-part inquiry. First, the proponent of the evidence must identify some material issue, other than the defendant's criminal propensity, to which the evidence is relevant (People v Hudy, 73 NY2d at 55; People v Alvino, 71 NY2d at 242). Second, the court must weigh the probative worth of the evidence against its potential for undue prejudice resulting to the defendant (People v Hudy, 73 NY2d at 55; People v Alvino, 71 NY2d at 242). Thus, "[i]f the evidence is actually of slight value when compared to the possible prejudice to the accused, it should not be admitted, even though it might technically relate to some fact to be proven " (People v Allweiss, 48 NY2d at 47).

Here, the Majority concludes that defendant opened the door to the admission of his confessions to the three uncharged murders. The evidence does not support this conclusion. The prosecutor did not argue at trial that the defendant had opened the door. And the court itself did not rule that defendant's questioning of any witness had opened the door.

Both prior to and during the trial, the parties had discussed at some length the possible arguments defendant could make that would open the door to the remainder of defendant's confessions. The prosecutor had maintained that if defense counsel sought to challenge the voluntariness of his statement, or exploit the time gaps in the interrogation or sought to show that the statement was unreliable because defendant suffered from a leg injury, the remainder of the statements would become relevant to refute those contentions. Defense counsel agreed not to exploit the gaps in the interrogation time-line and agreed not to challenge the voluntariness of defendant's confessions.

Yet at no time following defense counsel's opening statement or during his cross-examination of the People's witnesses did the prosecutor ever claim that defense counsel had made an argument or sought to elicit any testimony to create a material issue in the case that could be answered by the introduction of defendant's confessions to the uncharged murders. At the time the Trial Judge ruled the confessions admissible, the prosecutor had not noted any action taken that had opened the door to that evidence. That behavior is quite telling since a prosecutor would normally urge the trial court to introduce otherwise excluded evidence in order to refute arguments offered by the defense. Moreover, even at oral argument, when asked at what point during the trial defense counsel had opened the door, the People could offer no

definitive answer.

The Majority nevertheless agrees with the People's argument, advanced for the first time on appeal, that defendant opened the door to the evidence by exploiting the unexplained gaps in the time-line of the interrogation. It is noteworthy that the trial court's reasons for admitting the evidence of defendant's uncharged crimes had nothing whatsoever to do with any purported exploitation of gaps in the time-line of defendant's interrogation. Moreover, there is no evidence in the record to support that conclusion. Defense counsel's remarks during his opening statement urging the jury to pay attention to the chronology of defendant's statements, taken in context, appeared to be merely an attempt to alert the jury to the fact that defendant had initially claimed that his wife shot Matos, voiced his intent to change his story when the confession was to be memorialized and then claimed to have shot Matos himself in the written statement. At no time did he attempt to make it appear that the police had subjected defendant to a drawn-out interrogation process in order to extract an involuntary confession from him. Importantly, defense counsel had withdrawn his request for a jury charge on the voluntariness of the confessions and repeatedly assured the court that he did not intend to make any arguments to that effect.

Nor did defense counsel attempt to extract a time-line of the interrogation from the prosecution witnesses. Indeed, prior to the testimony of Investigator Sheridan, it was the prosecutor who elicited from its witnesses the approximate times of their encounters with defendant. And it was the prosecutor who first elicited from Sheridan that he first came into contact with defendant at 5:45 p.m. During Sheridan's cross-examination, defense counsel ascertained that defendant met with his brother at about 8 p.m. and again later in the

evening. Sheridan also testified that at some point, defendant met with his wife. In addition, Sheridan testified that defendant made a second handwritten addendum to his statement concerning the Matos killing at approximately 2 a.m. However, not even these are indicative that defense counsel intended to exploit time gaps in the interrogation process to argue that defendant's statements were involuntary. He never specifically called upon Sheridan to illuminate that the interrogation spanned eight hours. As defense counsel had explained to the court, those questions were intended to establish when he had written the addendums in relation to the two occasions when he met with his brother and in relation to when he met with his wife. Even the prosecutor agreed during a conference with the court that the use of the evidence for that purpose would not warrant the admission of the other confessions. [FN34]

Moreover, since defendant did not seek to challenge the voluntariness of his confession, it was not necessary for the prosecutor to account for the entire period of the interrogation. It was sufficient for the jury to know that defendant had given separate written and oral statements regarding the Matos killing and the two home invasions at the Avenue D apartment building. It was also apparent from the record that defendant had taken breaks during the course of the interrogation process. Thus, it would have been clear to the jury that defendant had been interrogated about different crimes by various police officers. And since nothing in the defense counsel's cross-examination suggested that the length of the interrogation suggested improper exertion on defendant which would affect the voluntariness or reliability of his confession, the door to the unrelated murder confessions was not opened.

Even had defense counsel sought to exploit the time gaps in the interrogation process, it still would not have justified the introduction of the details of defendant's statements concerning the other murders. If the discrepancy in the timing of the interrogation became an issue, it would have been adequate to allow Investigator Sheridan to testify that the reason that defendant's interrogation had extended into the next morning was because in addition to confessing to the crimes here, defendant had been providing the police with information regarding several unrelated open investigations. Since it would not have been necessary to delve into the specifics of the remainder of defendant's statements, there was no reason to admit this evidence to explain any time gap in the interrogation.

Also in concluding that the defense opened the door to the confessions concerning the additional killings, the Majority cites Sheridan's testimony regarding the leg injury that defendant suffered throughout the interrogation (Majority Op. at 44, 49, 54). However, it was the People who introduced that evidence, not the defense. During the direct examination of Sheridan, the following exchange took place:

"Q. What did the defendant do after he pulled his pant leg up?

A. He started to unwrap the gauze to show me his injury, and I stopped him and I said, you know, just leave it alone. I ---

Q. Why did you do that?

A. Well, it appeared to be pretty well wrapped up and I didn't want to disturb it any further. The injury did not appear to be bleeding. There did appear to be some blood on the gauze but it was not bleeding at the time that I looked at it so I wanted it to stay in the condition that it was in at that time.

Q. What happened when you told him not to unwrap it any more?

A. He stopped unwrapping it and then he wrapped the gauze back around and put his pant leg back down.

Q. Before leaving the interview room, did you have any conversation with the defendant about his physical condition?

A. Yes, we did.

Q. What, if anything, did you ask the defendant and what, if anything, did he tell you about his condition?

A. I asked him if he was injured and he said he was.

Q. * * * Why did you ask him if he was injured?

A. Well, just in talking with him I could see that he was having, he was in a little bit of pain. He would wince from time to time. As I said before, I noticed he was limping, so -- he was having some trouble with his leg, so I asked him if he was injured.

Q. What did he tell you?

A. He said he was and started to pull his pant leg up and I could see that there was a wound, or what I assumed was a wound, that was bandaged on his leg.

Q. When you say bandaged, what did you actually see on his leg?

A. I saw clean, white gauze wrapped around his shin area of his lower right leg."

The prosecutor then introduced People's Exhibit 41, which was a photograph of defendant's leg at the time of the interrogation. In the photograph, the gauze wrapped around defendant's leg was visible.

The following exchange subsequently took place between the prosecutor and Sheridan:

"Q. After he did that, did you have any other -- well, did you ask him if he knew how that happened?

A. Yes, I did.

Q. What did he tell you?

A. He said he wasn't sure. He said that it happened earlier that morning on Avenue D but he just wasn't sure how he got hurt.

Q. Did you ask him if he was shot?

A. I did.

Q. What did he tell you?

A. He said he just wasn't sure what it was. He said things happened so fast on Avenue D he just doesn't know how he got injured.

Q. So the only thing he told you definitely was that it happened that morning on Avenue D?

A. Right.

Q. Did you offer medical treatment at that point?

A. Yes.

Q. How did you do that?

A. I asked him if he wanted to go to the hospital and get some treatment for it.

Q. What did he tell you?

A. He adamantly replied, no, he didn't, he wanted to get this cleared up.

Q. Up until that point what, if any, observations had you made of the defendant's physical condition?

A. He was alert, conscious, able to field the questions, intelligent. He was excited at times and he obviously, he was in slight discomfort from time to time but he didn't want any medical treatment for it, and we had no difficulties communicating between the two of us."

By contrast, defense counsel's cross-examination of Sheridan regarding defendant's leg injury consisted entirely of the following exchange:

Q. And you accompanied Mr. Mateo from one interrogation room to the next to basically juggle positions

with people in other rooms; is that right?

A. Yes, it is.

Q. And he was limping at that point, right?

A. I believe he was.

Q. Did you give him assistance or did you walk next to him or what?

A. No. It wasn't a real noticeable staggered limp. I could see he was limping slightly. Just an observation. But, no, I didn't need to give him any physical assistance.

It is unreasonable to conclude as the Majority does that defense counsel's questioning "creat[ed] the impression that the injury rendered the confession unreliable" (Majority Op. at 54, n.27). If the door to the other murder confessions was opened based on the evidence of defendant's leg injury, it was the People's in-depth examination regarding the injury coupled with their introduction of the photograph depicting defendant's bandaged leg that opened the door. Defense counsel's limited questions about whether defendant had a limp surely could not be to blame. Having introduced the evidence themselves, the People should not thereafter complain that the excluded evidence should be admitted because of the possibility that the defendant might use it to argue that his statement was involuntary and unreliable, even though the defendant had not yet done so. If the People can circumvent an order excluding evidence of prior bad acts by introducing evidence that, if introduced by the defendant, would open the door to those prior bad acts, the Molineux rule would lose much of its potency.

It should also be noted that even if defendant's leg injury would create the impression for the jury that defendant had been suffering throughout the interrogation and that it would affect the voluntariness of his statement, Sheridan's testimony that he offered defendant medical assistance but defendant

declined it and insisted on continuing the interrogation suffices in dispelling that impression.

The Majority further states that because of the exclusion of the evidence of the other murder confessions the People had been barred from explaining why defendant had been concerned for his family throughout his interrogation (Majority Op. at 43-44). That is not the case. The People elicited from Police Officer DiMascio (who testified before Sheridan) that defendant's brother, Victor Cordero, was arrested along with defendant. Moreover, Sheridan testified on direct examination that when he first met defendant, he was in an interrogation room that was adjacent to one in which another of defendant's brothers, Gilberto Gomez, was being held. Finally, Sheridan testified that defendant's wife was also in custody at the time of defendant's interrogation. This evidence was more than sufficient to explain why defendant would have been concerned for his family. Moreover, the prosecutor never claimed that questions that resulted in answers that defendant had expressed concerns for his family would open the door to the other murder confessions. On the contrary, during discussions with the court, the prosecutor stated, "In terms of a general question, did the defendant express concern for his family, I think that type of a general question could be asked without opening the door to the other murder[s]."

The Majority also concludes that defense counsel opened the door to defendant's confessions to the uncharged murders by challenging the truthfulness of his confession of the Matos murder. However, in so concluding, the Majority misconstrues the defense strategy. For example, the Majority's opinion suggests that defendant's confessions to the Matos killing were essentially consistent, and that the defense had only the option of explaining why it should not be believed

(i.e. , because he was only trying to protect his family or because his power was overborne as a result of the long interrogation and the leg injury). This fails to account for that portion of Sheridan's testimony in which he stated that defendant had originally claimed that Szlekovics shot Matos and then changed his story to claim that he had shot Matos. The Majority also creates the impression that the only mention by defendant that he wanted the death penalty came during defense counsel's re- cross examination, at which time an objection to the question was sustained (Majority Op. at 49, 55) [FN35]. In fact, during the prosecutor's direct- examination of Sheridan's testimony, the following exchange took place:

"Q. Now, during the course of that conversation did there come a time when you asked him further questions regarding who actually pulled the trigger and fired the shot that killed Mr. Matos?

A. Yes.

Q. What did you ask him?

A. Well, at one point I looked Mr. Mateo right in the eye and I said, who really pulled the trigger in the basement-- meaning the basement of the Saxton Street house -- and he looked at me and he said why, and I said because I think Monica did it.

* * *

Q. What did he tell you?

A. When I said I believe Monica did it, we believe Monica did it, he said she did. I couldn't believe it. She is a crazy bitch, shot the guy. In other words, he didn't expect her to pull the trigger. But he said he was at the top of the stairs and she shot the guy in the head, which surprised him.

Q. So, at that time he told you he was at the top of the steps when Mr. Matos was shot?

A. Right.

Q. What did he tell you after that?

A. He said, he said after he told me that Monica did it, he then said, but I'm going to say that I did it when I give you my statement.

Q. Did you ask him about that?

A. Sure. I said why. And he said, because I want the death penalty.

Q. Did you ask him about that?

A. Yes.

Q. What did you ask him and what did he tell you?

A. I simply said, why, why do you want the death penalty, and he said because he was -- and he used the Spanish term which means king -- he said, I'm a king and I can't do a hundred years in jail. He said, I can't take my life because I am a king so I want the death penalty for this, and he also said because he deserved it.

Q. During that conversation when he told you he was going to take the blame for it, did he tell you anything about whose fault he believed this was?

A. Oh, he continually said that it was his fault for Sherer Street."

Of course, on cross-examination, defense counsel followed up on this testimony:

"Q. And essentially you looked him right in the eye and you said, "Who actually pulled the trigger"? Is that correct?

A. Right.

Q. And in response to that Mr. Mateo looked at you and said, "Why?" Is that right?

A. Yes.

Q. And you in turn told him that you believed Monica did it?

A. Yes.

Q. And in response to that, Mr. Mateo indicated she did and that he couldn't believe it. And that she was crazy. He couldn't believe she shot him; is that right?

A. Yes.

Q. And he was at the top of the stairs when she shot him and didn't even see her shoot him; is that correct?

A. Right.

Q. And it's fair to say during this particular exchange when you looked Mr. Mateo right in the eye and you say who actually pulled the trigger, and he responds, his demeanor changed; is that right?

A. Yes.

Q. And it changed, it was different from what it was previous to this; is that correct?

A. Yes.

Q. Now, after he indicates to you that he was surprised at this, he said I'm still going to take the blame for it, I'm going to take the []rap for it; is that right?

A. Yes, he did.

Q. And you basically followed that up with why if she did it are you going to take the []rap for it?

A. That's right.

Q. And he indicated to you he's going to take the []rap for it because it's his fault and he wants the death penalty; is that right?

A. That's right.

Q. And you pretty much followed up on that: Well, why do you want the death penalty? Basically you followed up on that: Why do you want the death penalty? Is that correct?

A. Yes.

Q. He indicated, he used that Spanish term for king and he didn't want to do a hundred years in prison, he'd rather die; is that right? Something along those lines?

A. Yes. And that he deserved it and he couldn't take his own life.

Q. He also indicated to you that living in jail for a hundred years would hurt his mother too much?

A. Yes."

The importance of this testimony cannot be overstated for it is at the heart of the defense strategy. The Majority mischaracterizes the defense as attempting to demonstrate that after being arrested, defendant discovered that his wife was a prime suspect in the Matos killing and then offered to implicate himself in order to protect her from prosecution. This, however, was not the actual strategy of the defense. The defense sought to establish, not why defendant confessed to the Matos killing in the first place but, given that defendant had offered conflicting accounts of who killed Matos, which account was true. The defense sought to establish that defendant's oral statement that his wife killed Matos and that it was a surprise to him was true, rather than his written statement in which he claimed to have shot Matos himself.

From his opening statement to the jury, defense counsel sought to show that defendant neither killed Matos nor ordered his wife to do so and that his wife acted on her own. Counsel's emphasis on defendant's admission that he was taking the blame for the killing because he felt responsible for it and wanted the death penalty was an attempt to demonstrate defendant's motivation for changing his story, which would support the defense position that the oral statement should be believed over the written one [FN36].

Had the defense been successful in convincing the jury that Szlekovics shot Matos and that it was a surprise to defendant (which would tend to disprove the People's theory that he commanded her to kill), as he claimed during the oral confession, then he would have been convicted of only

second-degree murder, but not first-degree murder. For the purpose of this strategy, it was not necessary for the jury to know that defendant had offered to tell the police about four murders in exchange for the release of his family from custody. The jury was not being called upon to decide what would motivate defendant to offer any confession at all. The defense was trying to persuade the jury only that the oral confession rather than the written one was the true account of the killing. [FN37]

The defense was perfectly entitled to pursue a strategy challenging the truthfulness of defendant's confessions about the Matos killing without risking the introduction of the unrelated murder confessions. Regardless of defendant's statements concerning the uncharged murders, there can be no question that defendant lied in his rendition of the murder of Juan Matos. Defendant said that his wife shot Matos and expressed surprise that she had done so. He then said that when the time came for his statement to be committed to writing, he would say that it was he who shot Matos. When his statement was memorialized, defendant claimed to have been the shooter. Since the victim was shot only one time, defendant's two versions of the killing in which he identified different shooters necessarily meant that he lied about the circumstances of the killing. Even the Trial Judge acknowledged that the contradiction was apparent on the face of the confessions. And by the People's indictment against defendant, they acknowledge that because of defendant's contradictory statements, not even they could determine the identity of the shooter. It was for this very reason that the People were forced to employ alternative theories for the killing -- on the one hand arguing that defendant pulled the trigger, and on the other hand arguing that defendant's wife killed Matos at defendant's command.

Therefore, the real issue that the jury had to decide was whether defendant shot Matos; or his wife shot Matos at defendant's command; or defendant's wife shot Matos without having been commanded by defendant to do so. The evidence that defendant had also confessed to three additional murders could not possibly assist the jury in determining which of defendant's versions of the Matos shooting was true. None of the other three murders was in any way related to Matos's killing. They involved different dates, different accomplices and different motives. The evidence of defendant's confession to the killings of Diaz, Toro and Holley was probative only of defendant's propensity to kill and served no other function in demonstrating his guilt of the crimes charged here. Thus, there was no legitimate basis for its admission and it should have been excluded as a matter of law (see People v Hudy, 73 NY2d at 54).

That the evidence of the three uncharged murders was introduced in such a way as to demonstrate defendant's proclivity to murderous behavior was apparent by the manner in which the evidence was introduced. In addition to permitting Sheridan to testify about defendant's confessions detailing the circumstances of the other murders and to read the written statements to the jury, he was permitted to testify in detail about his own investigation into the murders of two of the victims. Sheridan told the jury that on the day after the murders (which took place months before defendant confessed to them), he had gone to the murder scene and discovered the bodies of Diaz and Toro. Sheridan described the positions of their bodies and testified to their numerous gunshot wounds and injuries. There was no proper basis for the admission of testimony regarding Sheridan's independent investigation into the uncharged murders. It was not germane to any issue to be decided in this case but rather was an

apparent attempt to establish defendant's guilt in the deaths of Diaz and Toro. The only possible reason for making such a showing would be to establish defendant's propensity to kill. As such, there was no legitimate basis for the admission of this evidence, and its admission constituted error (see People v Hudy, 73 NY2d at 54).

It is also necessary to recognize that even if the confessions to the uncharged murders were probative of defendant's contradictory confessions to the Matos killing, their probative value was necessarily hindered by the Trial Judge's jury instructions. On the one hand, the Trial Judge told the jurors that the uncharged murder confessions were admissible only to allow them to assess the truthfulness of defendant's statement regarding the Matos killing. On the other hand, the court instructed them not to consider the truthfulness of the statements concerning the other murders. Such an instruction frustrates the purpose of admitting the evidence in the first place. If the jury is not to rely on the confessions as being true, they cannot possibly use them to assess the truthfulness of defendant's confession regarding the Matos killing. The evidence of the uncharged murders could provide a useable measure of credibility only if the jury could rely on their credibility. The court's instruction disavowed the evidence even for this purpose. As such, there was plainly no use for this evidence other than to show defendant's propensity to commit the crimes charged.

Although the Majority downplays the prejudice flowing to defendant from the introduction of his confessions to the three uncharged murders, the prejudice here was overwhelming. It is difficult to imagine what could be more prejudicial to a defendant in a capital murder trial than evidence that on separate occasions he had killed three people in addition to the person he stands accused of killing. It is

likewise difficult to imagine that a jury could possibly avoid using the evidence of defendant's uncharged crimes, for which he had yet to be brought to justice, to conclude that he had such a violent character that he likely committed the crimes charged. After all, the jury learned that defendant was a hired gun for a drug dealer and had killed to avenge the theft of a bicycle. It is certainly doubtful that the jury could have avoided the conclusion that defendant was just the type of person who would have killed Juan Matos and committed the crimes at the Avenue D apartment building.

Under the circumstances presented here, the risk of unfair prejudice flowing from the introduction of this evidence substantially outweighed its probative value. That defendant challenged the truthfulness of his confession in no way tipped the scales in favor of introduction of the evidence, especially since defendant offered contradictory accounts of who killed Matos.

The Majority concludes that the jury would not have been unduly prejudiced by the evidence of defendant's additional murder confessions because of the evidence of his crimes at the Avenue D apartment building and the Matos killing. Defendant faced a possible death sentence upon a first-degree murder conviction for the Matos killing. The defense theory of the case was that Szlekovics had killed Matos without having been commanded to do so and that therefore defendant should be convicted of second-degree rather than first- degree murder. Importantly, the difference between the degree of conviction defendant would receive rested primarily on which version of his confession to the Matos killing the jury believed. The evidence that defendant had killed three other people in addition to Matos could not possibly help the jury to determine whether defendant's oral or written confession to the Matos murder was true. But

alerting the jury that defendant had actually killed not one but four people created an unjustifiable risk that the jury would convict him for the highest possible degree of murder because his murderous behavior generally warrants punishment (see People v Molineux, 168 NY at 292 [Other crimes evidence "would lead to convictions, upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one", citing Coleman v People, 55 NY 81, 90 [1873]). Significantly, in this case, there was no mechanism available by which the jury could otherwise hold defendant accountable for those three additional murders. By contrast, the jury had the power to punish him for the Avenue D home invasions by convicting him.

As Judge Cardozo aptly noted, "[i]f a murderous propensity may be proved against a defendant as one of the tokens of his guilt, a rule of criminal evidence, long believed to be of fundamental importance for the protection of the innocent, must be first declared away" (People v Zackowitz, 254 NY 192, 197 [1930]). The evidentiary rule set forth in Molineux is the law of this State. As such, it must be applied equally -- even to the most unworthy of defendants, and even if it means the toil of a retrial.

To be sure, an assignment of error to the introduction of defendant's confessions to three uncharged murders would necessitate a reversal of his conviction and a new trial on all charges. But justice requires that we faithfully apply the law to the facts of the case before us. Many decades ago, Judge Fuld, writing for this Court declared, "Vicious though the crime was, convincing though the evidence of guilt may seem to be, we could affirm only if we were to announce a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendant's guilt.

We are not prepared to announce such a doctrine" (People v Mleczko, 298 NY 153, 163 [1948]). The introduction of the confessions to three murders unrelated to the crimes for which defendant was on trial deprived him of a fair trial.

Because the trial court's admission of defendant's confessions regarding three uncharged murders was in direct violation of the Molineux rule, I dissent from the Majority and vote to reverse defendant's conviction and to remand the case for a new trial.

ROSENBLATT, J. (dissenting):

Although both the majority's and Judge Smith's writings are compelling, I am not fully in accord with either and therefore write separately. Apart from its treatment of the trial court's ruling regarding defendant's confession (the pivotal issue separating Judge Smith from the Court), I find the majority opinion persuasive.

To begin with, I join the Court in rejecting defendant's claim that the People corrupted the truth-finding process by advancing one theory at his trial after having advanced what he asserts was an inconsistent theory at Monica Szlekovics's trial. Further, due process does not, in my view, require the jury to embrace one of the People's theories (that defendant killed Matos by his own hand or commanded Szlekovics to do so) to the exclusion of the other. Because the jury arrived at a unanimous determination that either was the case, it should not matter whether some jurors thought defendant pulled the trigger and others thought he ordered Szlekovics to do so. Further, I agree that defendant's statement was voluntary and that the verdict comported with the weight of the evidence presented.

Like Judge Smith, however, I would hold that the trial

court committed reversible error by allowing the jury to hear detailed recitations as to defendant's three unrelated murders. The majority concluded that this was an acceptable ruling, while Judge Smith calls it a Molineux error. Judge Smith adds that proof of defendant's having committed the three other murders was not at all relevant to the truthfulness of defendant's confession and could not possibly help the jury in determining exactly how Matos met his death.

In my view, the majority correctly decided not to characterize its ruling as a Molineux exception. Indeed, as the majority points out, no one even mentioned Molineux , by name or in principle, when the court was considering whether to allow the jury to learn of the other three murder confessions (see Majority at 52 n 26). Molineux issues generally arise when the prosecution seeks to introduce proof of uncharged crimes to prove that a defendant committed the crime charged. Molineux evidence, in this sense, is often an offensive weapon employed by prosecutors to persuade the jury of a defendant's guilt. Thus, when a Molineux exception applies, [FN1] the prosecution may, on its direct case, introduce evidence of a defendant's uncharged crimes and need not wait until the defendant presents something the prosecution needs to negate (see e.g. People v Cook, 93 NY2d 840 [1999]; People v Cohen, 5 NY2d 282 [1959]). Of course, as a defensive tactic, the prosecution may introduce evidence of uncharged crimes to negate a claim of accident, mistake, or the like (see People v Rojas, 97 NY2d 32 [2001]; see also People v Ingram, 71 NY2d 474 [1988]; People v Goldstein, 295 NY 61 [1946]). Here, the prosecution did not seek to introduce proof of the three unrelated murders either to prove that defendant killed Matos or that he had a murderous propensity to do so (personally or by command). Indeed, the People fully abided by the trial court's initial ruling that any reference to the three murders

was taboo. There is no doubt that if defendant had not "opened the door," the trial court would never have let the jury know of defendant's other murders.

The question, therefore, is whether the court was justified in allowing proof of three unrelated murders in reaction to defendant's having opened the door. As with most "door opening" rulings, this one requires us to examine a number of factors, including the size of the opening and what lay on the other side of the door. Here, defendant sought to exploit the court's preclusive ruling and create a false impression about the nature of his confession. Nevertheless, in balancing these considerations I conclude that the ruling was wrong and fell far outside any tolerable exercise of discretion.

It is not enough to say that defendant opened the door. In many trials, parties open doors to the introduction of proof. Sometimes they fling the doors wide open; other times, they open them just a crack. The trial judge's response should be proportionate and reflect the size and nature of the opening. Here, the court's response, to admit the three confessions, was inordinately prejudicial.

This is true for a number of reasons. I agree that the court cautioned the defense to be careful in how it went about challenging the truthfulness or reliability of the Matos confession. But I cannot agree that, to the extent he strayed at all, defense counsel strayed appreciably beyond the boundaries of the court's preclusive order or that his transgression called for such an extreme ruling. More importantly, the prosecution did not ask for it. Ordinarily, a trial court can count on a party to protest that its adversary opened the door to proof that in fairness should be explained or refuted. The court's unsolicited decision to allow proof of defendant's three other murders (and thus acquaint the jury

with defendant's true "motivations" for confessing to the Matos murder) was prejudicial in the extreme.

It is a fundamental tenet of evidence law that a court, when assessing the admissibility of evidence, engage in a weighing process, balancing prejudice against probative value. Here, however, the court failed to undertake any such analysis. The record is bereft of any mention of the court's considering possible prejudice. Indeed, in the protracted discussions before it allowed the confessions into evidence, the court never so much as mentioned the word " prejudice" or its equivalent.

Nevertheless, the introduction of the other confessions was overwhelmingly prejudicial [FN2] . The central question for the jury was whether defendant pulled the trigger or ordered his wife to do so -- or did neither, in which case he would be guilty of (intentional) murder in the second degree, as an accomplice. In this setting, the court allowed the jury to learn that defendant was (at least) a three-time murderer. No evidence could have had a more pernicious impact on the jury than defendant's homicidal history. The admission of detailed evidence of three unrelated murders would undermine the neutrality and dispassion of even the fairest and most diligent of fact-finders.

When discussing door openers, an appropriate starting point would be the case in which a defendant's conduct at trial most obviously opens the door to the introduction of confessions that reveal uncharged crimes: if a defendant with an established history of violence testifies and purports to be a peaceable person, surely the prosecutor could explode the lie and impeach the defendant with otherwise precluded or suppressed admissions proving the contrary [FN3] . Even if a defendant does not testify, but falsely creates the impression of being nonviolent, the prosecution would have a strong

basis to argue that the jury was being misled and that the defendant should pay a heavy price for such duplicity. Here, however, defendant neither testified nor asserted any facts in conflict with his having committed three previous murders. Defense counsel merely asked oblique questions about the circumstances of the interview. It is hard to see how these mildly suggestive queries stood to be properly refuted by proof that he murdered three other people. It is hard to see how the details of three homicides were appropriate to refute what amounted to innuendo. I cannot agree with Judge Smith that the confessions were entirely irrelevant, but I believe that their relevance was slight.

Here, the appropriate response -- one proportionate to the sliver of an opening defendant created -- might have been to allow the prosecution to establish that defendant revealed having committed other crimes. This would have blunted any possible claim that the police were overbearing in questioning defendant for several hours. Further, it would have neutralized defendant's dubious suggestion that by confessing to the Matos murder he was engaging in a noble fraud to exonerate his family. Of course, the jurors might have speculated about those other crimes, but they could not easily leap to the conclusion that "other crimes" meant three vicious homicides. Even if the trial court had some legitimate basis to inform the jury that defendant confessed to a trio of other murders, it should have stopped there. Defendant's confessions to these other homicides were lengthy and graphic, and the trial court improperly permitted the jury to hear every detail.

For these reasons, I would reverse defendant's conviction and order a new trial.

* * * * * * * * * * * * * * * * * *

Judgment modified by vacating defendant's sentence and remitting to County Court, Monroe County, for resentencing in accordance with the opinion herein and, as so modified, affirmed. Appeal from County Court order dated March 11, 1999 dismissed. Opinion by Chief Judge Kaye. Judges Ciparick, Graffeo, Read and Robert Smith concur. Judge George Smith dissents and votes to reverse and order a new trial in an opinion. Judge Rosenblatt dissents and votes to reverse and order a new trial in a separate opinion.

FOOTNOTES

FN1. On January 17, 1997, the People filed notice of their intent to seek the death penalty pursuant to CPL 250.40(2).

FN2. CPL 220.10(5)(e); 220.30(3)(b)(vii).

FN3. During an eight-hour interrogation beginning at 5:45 p.m. on November 6, 1996, defendant made a lengthy confession to the Matos murder, three other homicides and the Avenue D incidents. Those admissions were subsequently reduced to written statements, signed by defendant, about each crime. Our later references to the "confession" are to defendant's statements during the interrogation in their entirety.

FN4. On November 12, 1998, the People filed an amended trial indictment that eliminated the counts pertaining to the three other murders. Count 10 of the original indictment was renumbered Count 5 for trial. In addition, defendant was indicted on three counts of second degree kidnapping for the home invasion on October 11, 1996 (Counts 1-3). He was charged with second degree felony murder for the killing of Matos (Count 6) and first degree kidnapping for the abduction of Matos (Count 7). In connection with the home invasion on November 6, 1996, he was indicted on

attempted first degree murder in the course of and in furtherance of a burglary (Count 8), kidnapping in the second degree (Count 9), first degree burglary (Count 10) and first degree assault (Count 11). He also faced two counts of third degree criminal possession of a weapon for possessing firearms on October 11, 1996 and November 6, 1996 (Counts 4, 12). The jury found defendant guilty on all 12 counts.

FN5. Defendant also filed an amended notice of appeal dated April 13, 1999, which sought to appeal from the judgment and, in addition, from County Court's March 11, 1999 order denying his renewed CPL 330.30 motion. The appeal from County Court's order should be dismissed because the order is not directly appealable to this Court under CPL 450.70.

FN6. We note that defendant raises not a single challenge to the Trial Court's rulings related to the two-month jury selection process.

FN7. Monica's jury also heard that she had previously blamed defendant for shooting Matos.

FN8. The first degree kidnapping statute, Penal Law § 135.25 (3), provides that a person is guilty of that crime when he or she abducts another person who dies during the abduction or before being able to return or to be returned to safety.

FN9. See Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 125.27, at 390.

FN10. Prior to trial, defendant moved to dismiss the first degree murder count as duplicitous because it charged him with the killing as the shooter and as the commander of another person. While defendant no longer presses his claim of duplicitous counts on appeal, the Trial Court's reasoning is persuasive on the issue before us:

"[t]he language 'commanded another person' is not an additional element to the offense of an intentional killing in the course of and in furtherance of a felony. Rather, under this statute, the People may charge the defendant as a principal, or in a limited situation, as an accomplice" (175 Misc 2d at 207).

FN11. Before the case was submitted to the jury, defendant requested that the court instruct the jury that, to find him guilty, they had to be unanimous as to whether he shot and killed Matos, or commanded his wife to do so. The Trial Court rejected defendant's request, and instructed the jury that:

"Your verdict, as I have mentioned before on each of these charges, has to be unanimous. That means all twelve have to agree upon a verdict. All twelve of you deliberating on a case do not have to agree that the Defendant was the shooter nor do all twelve deliberating on the case have to find that the Defendant was the commander. It is sufficient that all twelve find the Defendant was either the shooter or the commander under Murder in the First Degree."

FN12. We reject as meritless defendant's contention that the Trial Court erred in instructing the jury on the definition of "command." Indeed, in Couser, we cited with approval the Trial Court's definition in Mateo (94 NY2d at 636-637).

FN13. Schad itself cited People v Sullivan (173 NY 122 [1903]) as the leading case for the proposition that the jury need not necessarily concur in a single view of the transaction, in order to reach a verdict (501 US at 641). There, a single crime was charged in the indictment, first degree murder, under then-existing Penal Code § 183. As the Court explained, "[i]f the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation and part upon the other" (173 NY at 127,

quoting Murray v New York Life Ins. Co., 96 NY 614 [1884]).

FN14. In light of this conclusion, we also reject defendant's contention that the jury verdict was unreliable in that it did not enable him to know which theory to mitigate at sentencing.

FN15. Contrary to defendant's assertions, the reasonable doubt charge here conveyed the proper standard.

FN16. After the jury sent a note asking for the medical examiner's testimony on the cause of death, defendant asked the court to "instruct the jury that the indictment has charged [defendant] with causing the death by shooting or commanding another to shoot the victim with a gun and that is the only cause of death that has been alleged." On appeal, defendant contends that the court was required to instruct the jury not to consider a suffocation theory of murder. This claim is not preserved, and in any event, without merit. The evidence in the case did not support the suffocation theory, nor was it charged or argued by the prosecutor. The court's main charge referred to "shoot" or "shooting" no less than nine times.

FN17. In his statements to police, defendant described the materials used to wrap the body, including curtains and a green blanket. Investigators corroborated these details when the body was found.

FN18. We reject defendant's claim that information provided by an informant in a search warrant application was unreliable.

FN19. During the interrogation, defendant admitted his involvement in the double homicide of Diaz and Joangel Toro.

FN20. At trial, the People must prove the voluntariness of a confession beyond a reasonable doubt (Anderson, 42 NY2d at 38-39) when that issue is properly raised by the defense. For voluntariness to be submitted to the jury, there

must be a proper objection and an offer of evidence sufficient to raise a factual dispute (People v Cefaro, 23 NY2d 283, 286-287 [1968]). Defendant submitted a written request to charge involuntariness conditioned upon his own introduction of evidence showing involuntariness. He subsequently withdrew his request on the record, as a matter of strategy, and never renewed it at the charge conference. Thus, he failed to place the voluntariness question before the jury (id. at 288-289).

FN21. Defendant couched his objection to the Trial Court solely in terms of an evidentiary error.

FN22. Defendant's other claims of evidentiary error, pertaining to the admission of the Avenue D incidents and his abuse of Janette Sanchez, and the exclusion of a taped telephone call to his mother, are also without merit.

FN23. In his dissent, Judge Smith acknowledges the Trial Court's conclusion that 'evidence of the other murder confessions was relevant to address issues raised about the voluntariness and the truthfulness of defendant's statements, especially as they related to promises made by the police and their negotiations with the defendant' (Smith dissent at 13). While Judge Smith disagrees with that conclusion, the Trial Court manifestly had a reason for drawing it other than to 'demonstrate that the defendant was predisposed to commit the crime charged' (Smith dissent at 13).

FN24. Defendant's telephone call to his mother was not part of his confession, but occurred afterward. The Trial Court precluded cross-examination about it because of defendant's admission to "four bodies."

FN25. At that point in the proceedings, defendant's belated offer to withdraw his request for a truthfulness charge on the question of defendant's motives for confessing, after sharply focusing on that question, was an empty one, as the

People argued and the Trial Court concluded.

FN26. While the Smith dissent rests entirely on People v Molineux (168 NY 264 [1901]), that was never the argument of the defense at trial, or its objection to admission of the statements, or the basis for the Trial Court's ruling. Indeed, defendant's mistrial motion, made several days after the statements were received in evidence, recognized that the ruling was based solely on the defense having opened the door. We note, moreover, that the evidentiary rule concerning "door-opening" is at least as venerable as the rule excluding prior bad acts (see e.g. People v Buchanan, 145 NY 1, 23-24 [1895] [acknowledging defendant opened the door, in first degree murder prosecution, to hearsay conversation between witness and coroner to rebut suggested inference concerning the motives of the testifying witness]).

Nor is defendant's current contention that the Trial Court dropped a "surprise, mid-trial decision" on defense counsel supported by the record. From day one, counsel was repeatedly warned that overstepping the preclusion order could open the door to defendant's full confession.

FN27. True, Sheridan had testified on the People's direct case that defendant's leg was wounded and he was offered medical treatment but refused. The Trial Court ordered limited cross-examination about the injury:

"If the testimony and evidence of the physical condition of the defendant is argued to the jury as being relevant on the issue of voluntariness of the statement and reliability of the statement, then clearly evidence of the defendant's ability to assert himself, to control the circumstances or attempt to control the circumstances under which the statements were made, to control the circumstances under which the interrogation took place, setting the conditions for that interrogation, for verification of those conditions that had

been agreed upon, all those go to his state of mind, his ability to think, perceive, react and as such all bear on the issue of reliability and voluntariness."

We disagree that, in these circumstances, we are creating a new rule that "the People can circumvent an order excluding evidence of prior bad acts by introducing evidence that, if introduced by the defendant would open the door to those prior bad acts" (Smith dissent at 26). Rather, the defense was explicitly told that it could ask general questions about the injury but if it went further, creating the impression that the injury rendered the confession unreliable, it did so upon peril of opening the door to proof of what actually happened during the interrogation. As the Trial Court concluded, defense counsel's repeated emphasis on the injury, as part of the false picture before the jury, crossed the line that had been drawn.

FN28. Judge Smith maintains that "[t]he jury was not being called upon to decide what would motivate defendant to offer any confession at all. The defense was trying to persuade the jury only that the oral confession rather than the written one was the true account of the killing" (Smith dissent at 33). Yet in claiming the written statement a lie, defendant explained it away in another lie--that he confessed to cover for Monica. The jury was thus called upon by defendant to examine why he confessed and the People were permitted to answer that question with proof that he admitted not one but four murders, not for Monica, but to achieve the release of his family.

FN29. Nor, surprisingly, did defense counsel say anything when the prosecutor elicited from Sheridan details corroborative of the other homicides.

FN30. Ventimiglia did not involve door-opening, but an application of the rule against admitting prior crimes to show

propensity. As these concepts are often related, the reasoning of Ventimiglia is instructive (see Rojas, 97 NY2d at 38). In Ventimiglia, moreover, we concluded that "[w]here defendants charged with murder, kidnapping and conspiracy have stated as part of their planning that they have a place for disposing of the body 'where we put people * * * and they haven't found them for weeks and months', the statement is admissible because its probative value as to premeditation of the murder and as to the plan of the conspiracy outweighs the prejudice resulting from the admission implicit in the statement that defendants have committed prior murders" (id. at 355-356).

FN31. It is important to note that regardless of what rulings defense counsel sought before conducting Sheridan's cross-examination, all that matters is what was educed during testimony before the jury. For that reason, for the purpose of this analysis, it matters not at all that counsel asked to inquire about alleged promises that defendant's family would be released or alleged promises that the police made regarding Monica or Victor's charges or the substance of what defendant learned about Monica's statements or the substance of defendant's telephone conversation with his mother. Counsel's requests to inquire into all of those subjects were denied and counsel fully complied with the trial court's ruling.

FN32. The Majority suggests that defense counsel's questioning about defendant's meeting with his brother was inappropriate (Majority Op at 46-47). However, limited questioning about whether defendant told his brother that the Matos incident and the home invasions "stemmed from his personal relationship with Janette and Monica" was proper, particularly given that during Sheridan's direct examination, the prosecutor established that Sheridan had arranged a second meeting with Victor at which time he told Victor that

he had confessed to the police, apologized for involving him in his crimes and said that Victor would have to testify against him.

FN33. Contrary to the position of the Majority and Judge Rosenblatt, this case does implicate People v Molineux (see Majority Op. at 52, n.26; Dissent at 2-3). The issue here regards the admissibility of evidence that defendant had committed three murders which are not charged in this capital murder case. The Molineux rule deals with just this type of evidence of prior bad acts and requires that it be excluded unless it is probative of a material issue other than the defendant's criminal propensities, and its probative value outweighs its risk of prejudice to the defendant. Thus, it is the traditional Molineux principle that excludes this evidence in the first instance. The prosecutor never noticed the other murder confessions as Molineux evidence during the pre-trial proceedings because he had assured defense counsel in a letter that he would not seek to introduce the confessions unless defendant made them an issue at trial (one of the exceptions to the Molineux rule). But regardless of how the arguments were framed before the trial court, the conferences between the parties had all the earmarkings of a Ventimiglia hearing, a progeny of Molineux, in order to obtain an advance ruling from a judge before the introduction of arguably prejudicial testimony). Furthermore, in his motion for a mistrial based on the introduction of the other murder confessions, defendant relied entirely on Molineux. Generally speaking, evidence that would otherwise be excluded under Molineux may be admitted where the evidence is probative of a material fact in the case being prosecuted. A material issue for which the evidence is probative does not necessarily have to arise in the People's direct case. Such an issue can arise as a result of defendant's testimony or an interposed defense.

That circumstance would present an exception to the exclusion of the evidence pursuant to Molineux (see e.g., People v Santarelli, 49 NY2d 241, 247-48 [1980][evidence of defendant's past crimes relevant to rebut insanity defense]; People v Calvano, 30 NY2d 199, 205-06 [1972]; People v Alvino, 71 NY2d at 246 [evidence of prior drug sales admissible to rebut defendant's testimony that he did not sell drugs and that he possessed 21 glassines of cocaine for his own personal use]). Finally, it is not my position that "door opening" by the defense is not a valid reason to introduce evidence of prior bad acts. Indeed, this Court has said as much in People v Rojas (97 NY2d 32 [2001]). It is my position, however, that a fair reading of the record reveals that the defense did not open the door in this case and that therefore, the confessions should have remained excluded pursuant to the Molineux rule.

FN34. Contrary to the Majority's view (Majority Op. at 56), it is not my contention that the People opened the door to a time-line by eliciting testimony that defendant confessed in an eight-hour interrogation or that his interview concluded in the early morning hours. But the People did first establish the time of the start of defendant's interrogation. It is my contention that the People opened the door with respect to defendant's leg injury.

FN35. Contrary to the Majority's assertion (Majority Op. at 55), defendant never said that he was confessing because he wanted the death penalty. Rather, he said that he was changing his story about the Matos killing and taking the blame for it because he wanted the death penalty.

FN36. According to the Majority, the defense tried to convince the jury that he had changed his account of the Matos killing in order to protect his wife from prosecution (Majority Op. at 54-55, n.28). In fact, defense counsel sought to

show that defendant's motivation for changing his story was apparent from his statement to the police that he would take the blame for the murder his wife committed, not out of a desire to protect her, but rather to ensure that he received the death penalty. Evidence that defendant had confessed to three uncharged murders does not refute this argument, but rather supports it. Undoubtedly, from defendant's perspective, the more murders to which he confessed, the more likely that he would receive capital punishment. Thus, the door to the other murder confessions was not opened by this argument.

FN37. It is for this reason that I disagree with Judge Rosenblatt's assessment that defendant tried to "create a false impression about the nature of his confession" and thereby opened the door if only slightly (Dissent at 4).

FN1. We discussed the Molineux rule and its exceptions most recently in People v Rojas (97 NY2d 32 [2001]).

FN2. While I do not see this as a Molineux exercise, the end result, for me, is the same. Under a Molineux analysis, the test boils down to a battle between prejudicial effect and probative value. In evaluating the "door- opening " type evidence before us, the test is precisely the same, and leads, in my view, to the same result that Judge Smith reaches.

FN3. See e.g. Harris v New York, 401 US 222 (1971); Walder v United States, 347 US 62 (1954); People v Maerling, 64 NY2d 134 (1984); People v Kulis, 18 NY2d 318 (1966).

APPENDIX B

INTERLOCUTORY DECISION OF THE NEW YORK COURT OF APPEALS, OCTOBER 14, 1998, HOLDING TWO PROVISIONS OF STATE CRIMINAL PROCEDURE LAW TO BE UNCONSTITUTIONAL

In the Matter of Charles J. Hynes, as District Attorney of Kings County, Respondent, v.
Albert Tomei, as Justice of the Supreme Court, et al., Appellants.

In the Matter of Howard R. Relin, as Monroe County District Attorney, Respondent,
v.
John J. Connell, as Monroe County Court Judge, et al., Appellants,
and Dennis C. Vacco, Attorney-General of the State of New York, Intervenor-Respondent.

Chief Judge Kaye.

Thirty years ago, the United States Supreme Court struck down the death penalty provision of the Federal Kidnaping Act (18 USC § 1201 [a]) , which allowed a defendant to be sentenced to death only after a jury trial. The Supreme Court invalidated the provision because, by needlessly encouraging guilty pleas and jury waivers to avoid death sentences, it impermissibly burdened defendants' Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial (United States v Jackson, 390 US 570). Despite the passage of three decades, a plethora of decisions involving the death penalty and a sea change in plea bargaining, the Supreme Court has never overruled Jackson,

which binds this Court. Indeed, every other death penalty State has fit its capital murder plea-bargaining procedures within the rationale of Jackson.

Three years ago, the New York State Legislature enacted a capital punishment statute that--like the Federal Kidnaping Act--allows a defendant to be sentenced to death only after a jury trial (L 1995, ch 1). Bench trials are not permitted in capital cases (see, NY Const, art I, § 2), and the statute bars imposition of a death sentence upon a guilty plea (see, CPL 220.10 [5] [e] ; 220.30 [3] [b] [vii]; 220.60 [2] [a]). The New York law thus explicitly provides two levels of penalty for the same offense, imposing death only on those who assert innocence and proceed to trial. [FN1] Defendants before us now challenge the plea provisions of the New York statute as violative of their Fifth and Sixth Amendment rights, relying on Jackson.

FN1 Significantly, of the 39 death penalty jurisdictions in the United States, only the New York statute provides for such a difference in maximum punishments.

Both trial courts held the plea provisions facially unconstitutional under Jackson (People v Hale, 173 Misc 2d 140; People v Mateo, 175 Misc 2d 192). In separate declaratory judgment actions, the Appellate Division of the Second and Fourth Departments subsequently declared the provisions constitutional (Matter of Hynes v Tomei, 237 AD2d 52; Matter of Relin v Connell, 251 AD2d 1041). We are convinced that Jackson compels the contrary result, and therefore reverse the Appellate Division orders and declare CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) unconstitutional. CPL 220.60 (2) (a) , in the absence of the other two challenged provisions, is constitutional. Because the unconstitutional provisions are

severable, the remainder of the statute is also unaffected by our ruling.

I.

The Federal Kidnaping Act considered in Jackson provided:

"Whoever knowingly transports in interstate ... commerce, any person who has been unlawfully ... kidnaped ... and held for ransom ... or otherwise ... shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

Because the Act authorized the death penalty only on the recommendation of a jury, while a defendant convicted of the same offense on a guilty plea or by a Judge escaped the threat of capital punishment, the Supreme Court concluded that the Act "needlessly" encouraged guilty pleas and jury waivers (United States v Jackson, supra, at 583; see also, Pope v United States, 392 US 651 [death sentence imposed under the Federal Bank Robbery Act (18 USC § 2113 [e]) vacated for the same reason]). The Court acknowledged that restricting the death penalty to cases in which a jury recommends it is a legitimate goal, and that such a restriction would likely decrease the frequency of capital punishment. However, the Court concluded these considerations did not save the Act from constitutional infirmity. While the Act's chilling effect on a defendant's exercise of the Fifth Amendment right against self-incrimination and Sixth Amendment right to a jury trial may have been incidental, the effect was also "unnecessary and therefore excessive," since Congress could have achieved its goals by allowing juries to sentence defendants to the full range of punishments regardless of how guilt was determined (id., at 582-583).

Shortly after Jackson, this Court invalidated two provisions of the former Code of Criminal Procedure that required waiver of a jury trial in order to receive the benefit of youthful offender treatment (see, People v Michael A. C., 27 NY2d 79). Although respondents who refused to waive a jury trial were not subject to the death penalty, they were exposed to longer prison sentences than those prosecuted as youthful offenders. Drawing a parallel to Jackson, this Court held that "a procedure which offers an individual a reward for waiving a fundamental *622 constitutional right, or imposes a harsher penalty for asserting it, may not be sustained" (id., at 86). [FN2]

FN2 Respondents' reliance on People v Sher (24 NY2d 454, mot to amend remittitur granted 24 NY2d 1031, cert denied 396 US 837), a case decided before Michael A. C., is misplaced. Defendant in Sher was not subject to the death penalty at the time of his appeal. On June 1, 1965, Governor Rockefeller announced that he would grant executive clemency to all death row inmates, such as Sher, who would not be subject to capital punishment under the revised death penalty statute, and commute their sentences to life imprisonment (see, People v Sher, supra, 24 NY2d, at 456, n, citing press release of June 1, 1965 by Governor Rockefeller at the time of approval of L 1965, ch 1030, § 125.30). Thus, Sher was subject to the same maximum sentence after a jury trial--life imprisonment--as he would have been had he pleaded guilty.

II.

New York's death penalty statute authorizes a District Attorney to file a notice of intent to seek the death penalty

against a defendant charged with murder in the first degree (see, Penal Law § 125.27; CPL 250.40). Upon conviction by a jury, a capital defendant faces a separate sentencing proceeding before a jury to determine whether the penalty imposed will be death or life imprisonment without parole (see, CPL 400.27). The statute affords a defendant the opportunity to ensure a maximum sentence of life without parole by pleading guilty pursuant to the following provisions:

"A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law ; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole" (CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]).

"A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter: (a) a plea of guilty to part of the indictment pursuant to subdivision three or four but subject to the limitation in subdivision five of section 220.10" (CPL 220.60 [2] [a]).

For all other crimes in New York only one top sentence is prescribed by statute.

(1) Thus, like the invalidated Federal Kidnaping Act provision, New York's death penalty statute explicitly provides for the imposition of the death penalty only upon a jury verdict. As a result, under the New York statute, only those defendants who exercise the Fifth Amendment right against self- incrimination and Sixth Amendment right to a

jury trial put themselves at risk of death. Nevertheless, respondents argue that the New York statute is distinguishable from the Federal Kidnaping Act in several ways. We conclude that the distinctions are without a constitutionally cognizable difference.

First, under the challenged New York provisions, a defendant can plead guilty to first degree murder, with agreement on the sentence to be imposed, only with the permission of the court and consent of the People (see, CPL 220.10 [5] [e]; 220.30 [3] [b] [vii]). Because a defendant does not have unilateral control of the plea process, respondents argue, the statute never gives a defendant the choice between facing a jury and risking death on the one hand, and pleading guilty and avoiding death on the other. Therefore, respondents urge, the statute cannot "needlessly" encourage guilty pleas.

The Supreme Court, however, has found approval of a trial court and a prosecutor irrelevant to the Jackson analysis. Defendants prosecuted under the Federal Kidnaping Act could not enter a plea of guilty as of right, since Federal Trial Judges had discretion to reject guilty pleas and jury trial waivers. This judicial involvement did not cure the constitutional problem: the statute's infirmity was not coercion of guilty pleas and jury waivers but needless encouragement of them (United States v Jackson, supra, at 583). Even though not every guilty plea to a charge under the Act was necessarily involuntary, the statute still impermissibly burdened defendants' constitutional rights (id.). [FN3]

FN3 In the years following Jackson, the Supreme Court made clear that Jackson did not establish a new test for determining the validity of guilty pleas, but rather prohibited the Federal Kidnaping Act's impermissible burden on a defendant's exercise of constitutional rights. The Court also

held that an otherwise valid plea is not necessarily involuntary if induced by the defendant's fear of the death penalty, and it refused to vacate guilty pleas simply because they were agreed to pursuant to statutes subsequently invalidated by Jackson (see, Brady v United States, 397 US 742; North Carolina v Alford, 400 US 25; Parker v North Carolina, 397 US 790).

The Supreme Court's subsequent application of Jackson further demonstrates that the People's involvement in the plea process fails to distinguish away Jackson's prevailing rationale. Three years after Jackson, the Supreme Court declared unconstitutional North Carolina's capital pleading scheme, which required the approval of both the prosecutor and the court for a defendant to plead guilty. Under the challenged North Carolina statute, if a defendant charged with capital murder tendered a signed plea of guilty, the prosecutor, with the court's approval, could accept or reject the plea. If the plea were rejected, the trial would "proceed upon a plea of not guilty and the tender of the plea of guilty would have no legal significance," exposing the defendant to the death penalty (State v Atkinson, 275 NC 288, 317, 167 SE2d 241, 259, revd 403 US 948). By contrast, if the plea were accepted, the effect would be a sentence of life imprisonment. In June 1971, after it had decided Brady, Alford and Parker, the Supreme Court reversed five death sentences imposed under this statute, in a summary disposition that, without explanation, simply cited Jackson:

"Judgments, insofar as they impose the death sentence, reversed, United States v. Jackson, 390 U.S. 570 (1968), Pope v. United States, 392 U.S. 651 (1968), and cases remanded for further proceedings" (Atkinson v North Carolina, 403 US 948; Roseboro v North Carolina, 403 US 948; Hill v North Carolina,

403 US 948; Williams v North Carolina, 403 US 948; Sanders v North Carolina, 403 US 948).

Thus, the need to obtain approval from the People and the court will not save plea provisions that otherwise violate Jackson (see also, People v Michael A. C., 27 NY2d 79, supra [Code of Criminal Procedure provisions unconstitutional on Jackson grounds, even though court approval was required, with or without the recommendation of the Grand Jury or District Attorney]). [FN4]

FN4 The Nevada Supreme Court, in striking Nevada's death penalty, also concluded that the approval of both the State and the court could not save an otherwise unconstitutional capital pleading scheme (Spillers v State, 84 Nev 23, 436 P2d 18, overruled on other grounds Bean v State, 86 Nev 80, 465 P2d 133).

Second, respondents argue that the challenged New York provisions are distinguishable from the Federal Kidnaping Act because they merely codify permissible plea bargaining, which was not at issue in Jackson. Subsequent to Jackson, both the Supreme Court and this Court have acknowledged the legitimacy and desirability--indeed, the necessity--of plea bargaining (see, Santobello v New York, 404 US 257; People v Selikoff, 35 NY2d 227, cert denied 419 US 1122). Plea bargaining serves important functions for both prosecutors and defendants, such as individualized justice, leniency and economy (State v Forcella, 52 NJ 263, 245 A2d 181, revd in part sub nom. Funicello v New Jersey, 403 US 948). A State clearly may encourage guilty pleas by offering benefits to defendants in return for a guilty plea (Corbitt v New Jersey, 439 US 212, 219). Furthermore, plea bargaining becomes no less lawful or desirable when it is codified in

statutory form (see, id., at 224, n 14).

While plea bargaining is permissible, the Supreme Court in Jackson prohibited statutes that "needlessly" encourage guilty pleas, which are not constitutionally protected, by impermissibly burdening constitutional rights. Given the availability of alternatives that do not impermissibly burden defendants' constitutional rights, the plea provisions of the statute before us "cannot be justified by [an] ostensible purpose" such as the facilitation of plea bargaining (United States v Jackson, supra, at 582-583).

Respondents rely heavily on Corbitt, in which the Supreme Court held that it is constitutionally permissible to offer a defendant the possibility of escaping the most severe penalty by pleading guilty (see, Corbitt v New Jersey, supra, at 217-219). The New Jersey statute at issue in Corbitt, however, provided for the same maximum sentence--life imprisonment--regardless of a defendant's plea. While a lesser sentence was permitted for those defendants who pleaded guilty, it was not guaranteed. Thus, the statute survived constitutional scrutiny because it did "not reserve the maximum punishment for murder for those who insist on a jury trial" (id., at 217). This situation is readily distinguishable from the challenged New York provisions, which indeed prescribe a lesser agreed-upon sentence for those who plead guilty. In the words of Jackson, "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die" (United States v Jackson, supra, at 581; see, Corbitt v New Jersey, supra, at 217). [FN5]

FN5 While the Supreme Court has never overruled

Jackson, it has not since Corbitt (decided in the quite different world of 1978) made reference to Jackson's "needless" encouragement of guilty pleas in any majority opinion. As discussed below, however, the Jackson rationale continues to have controlling significance in the State courts. Several State courts during the past two decades have explicitly relied on Jackson in declaring provisions of their States' death penalty statutes unconstitutional on this ground, most recently New Hampshire in 1991 (see, State v Johnson, 134 NH 570, 595 A2d 498).

Finally, respondents point to the bifurcated capital trial procedure in New York, by which a jury that finds a defendant guilty determines the sentence in a separate proceeding (see, CPL 400.27). By contrast, a defendant prosecuted under the Federal Kidnaping Act faced a unitary trial. Respondents suggest that under the bifurcated scheme, a defendant may have an opportunity to agree to a sentence after the guilt phase of the trial, and thus after exercising the rights to maintain innocence and to have a jury determine guilt.

This does not alleviate the Jackson problem, however, because bifurcation does not eliminate the statutory framework that allows the possibility of death only after a jury trial. Capital defendants under the New York statute who are awaiting trial and are offered a plea are still faced with the choice Jackson declared unconstitutional: exercise Fifth and Sixth Amendment rights and risk death, or abandon those rights and avoid the possibility of death. Furthermore, as respondents forcefully assert in trying to distinguish the challenged provisions from the Federal Kidnaping Act, a prosecutor is not required to accept a defendant's guilty plea. In fact, a prosecutor may be less willing to forego pursuit of

the death penalty after a defendant's guilt has been established beyond a reasonable doubt. Thus, before deciding whether to proceed to trial, a defendant cannot know whether a deal on the sentence to be imposed will be available after a guilty verdict and before sentencing, and bifurcation does not eliminate the "chilling effect" on a defendant's constitutional rights to maintain innocence and demand a jury trial (United States v Jackson, supra, at 582).

In sum, respondents' attempts to distinguish New York's death penalty statute from the death penalty invalidated by the Supreme Court in Jackson fail. We recognize that New York's death penalty statute carries a strong presumption of constitutionality, as do all statutes (see, People v Davis, 43 NY2d 17, 30, cert denied 435 US 998, rearg dismissed 61 NY2d 670). However, the New York provisions are unconstitutional for the same reason as the Federal Kidnaping Act: by statutory mandate, the death penalty hangs over only those who exercise their constitutional rights to maintain innocence and demand a jury trial. Thus, Jackson compels us to invalidate these provisions, just as it has compelled other State high courts to invalidate their capital plea provisions with the same constitutional infirmity (see, e.g., State v *Johnson, 134 NH 570, 595 A2d 498 [1991], supra; Commonwealth v Colon-Cruz, 393 Mass 150, 470 NE2d 116 [1984]; State v Frampton, 95 Wash 2d 469, 627 P2d 922 [1981]; State v Funicello, 60 NJ 60, 286 A2d 55 [1972], cert denied sub nom. New Jersey v Presha, 408 US 942; see also, Spillers v State, 84 Nev 23, 436 P2d 18 [1968], supra [decided prior to the Supreme Court's decision in Jackson]).

By contrast, the death penalty statutes of States that have rejected a Jackson challenge, with one exception, provide for the possibility of a death sentence upon a guilty plea (see, e.g., State v Mann, 1996 WL 465764, 1996 Tenn Crim App LEXIS

508, affd 959 SW2d 503, cert denied ___ US ___, 118 S Ct 2376; Conger v Warden, 89 Nev 263, 510 P2d 1359). The exception, Arkansas, avoided a Jackson problem because the Trial Judge, not the jury, made the final determination of whether the death penalty would be imposed, and because guilty pleas were permitted only after the prosecutor waived the death penalty (see, e.g., Ruiz v State, 275 Ark 410, 630 SW2d 44, cert denied 459 US 882).

III.

The question remains whether the entire death penalty statute must be invalidated, as defendants urge, or whether the challenged provisions may be severed, leaving the statute otherwise operational. The answer depends on whether "the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether" (People ex rel. Alpha Portland Cement Co. v Knapp, 230 NY 48, 60 [Cardozo, J.], rearg denied 231 NY 516, cert denied sub nom. State Tax Commr. v People ex rel. Alpha Portland Cement Co., 256 US 702). If removing particular provisions while leaving the remainder intact would result in a law the Legislature would not have intended, the entire statute must be stricken (see, e.g., Matter of New York State Superfund Coalition v New York State Dept. of Envtl. Conservation, 75 NY2d 88, 94).

In arguing that the death penalty itself should be stricken, defendants seek support from Jackson, in which the Supreme Court struck the death penalty from the Federal Kidnaping Act. In that statute, it was the death penalty provision itself, which was added two years after enactment of the original statute, that caused the constitutional infirmity. When enacted in 1932, the Federal Kidnaping Act did not provide for capital punishment; it merely defined the Federal

crime of kidnaping and set the punishment as imprisonment for a term of years, to be decided by the trial court (see, 47 US Stat 326). Regardless of how a defendant was convicted under the original Act, the potential penalties were the same.

The Act was amended in 1934, however, to change the penalty structure, providing for the imposition of the death penalty only on a jury recommendation, but a prison term otherwise (see, 48 US Stat 781). It was the addition of the death penalty in this manner, which resulted in different levels of punishment depending on whether defendants exercised their constitutional rights, that rendered the statute unconstitutional. Therefore, it was only through excision of the Act's death penalty clause that the constitutional infirmity could be cured. The result was the same sentencing system as the one contained in the original Act--those convicted would be sentenced by the court to imprisonment for a term of years. At the same time, by removing only the death penalty clause, the Court was able to preserve the purpose of the Act--to make interstate kidnaping a Federal crime.

In contrast to the Federal Kidnaping Act, it is clear from the face of the statute before us that the very purpose of the Legislature and Governor in enacting the statute was to provide for capital punishment in New York. The statute's severability clause indicates that the lawmakers would not have wanted the entire statute to fail if the particular provisions regarding pleas were declared unconstitutional:

"If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, part or provision thereof" (L 1995, ch 1, § 37).

Nor is invalidation of the death penalty necessary to obviate the Jackson problem: excision of the capital pleading provisions eliminates the burden on constitutional rights prohibited by Jackson, since without those provisions there is only one maximum penalty for first degree murder. Furthermore, the plea provisions are discrete, and by no means vital to the remainder of the statute. Their removal would not affect the classification of capital offenses, or the conduct of the trial or penalty phase of capital cases.

Finally, while CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) relate exclusively to pleas in first degree murder cases and "needlessly" encourage guilty pleas in violation of Jackson, CPL 220.60 (2) (a) is not limited to first degree murder cases, [FN6] nor does it, in the absence of CPL 220.10 (5) (e), violate Jackson. Therefore, only CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) must be stricken. [FN7] Under the resulting statute, a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending.

FN6 By its terms, CPL 220.60 (2) (a) allows defendants who have pleaded not guilty to any indictment to withdraw the plea before a verdict, subject to certain limitations, including the limitations of CPL 220.10 (5). Thus, CPL 220.60 (2) (a) affects many cases unrelated to first degree murder.

FN7 While there is nothing objectionable in the portion of the two unconstitutional provisions that merely allows a defendant to plead guilty to first degree murder with the permission of the court and consent of the People, saving this portion of the provisions would not eliminate the Jackson problem. Since by statute only a jury can impose a death sentence and there is no procedure for impaneling a jury to sentence a defendant after a guilty plea (see, CPL 400.27),

defendants could still avoid the possibility of death only by pleading guilty.

We realize this result will reduce the flexibility of both prosecutors and defendants who wish to plea bargain in capital cases. Indeed, our reversal in these cases may well have an ironic twist in that capital defendants will have fewer opportunities to avoid the possibility of the death penalty. We are also aware that the Supreme Court has not revisited Jackson and its progeny in 20 years, and that these cases might be decided differently today in light of the increased significance of plea bargaining and substantial changes in the administration of capital punishment. The fact remains, however, that although the Supreme Court itself may revisit its interpretation of Federal constitutional provisions, State courts are bound under the Federal Constitution to follow controlling Supreme Court precedent, and Jackson compels the result here.

While reducing the flexibility of plea bargaining in capital cases, excision of the unconstitutional provisions does not prevent pleas of guilty to first degree murder when no notice of intent to seek the death penalty is pending, since defendants in that situation face the same maximum sentence regardless of how they are convicted. Nor does the resulting statute prevent a defendant from pleading guilty to another offense not punishable by death, even when a notice of intent to seek the death penalty is pending, since nothing in Jackson prohibits imposing different penalties for different crimes. As the Supreme Court made clear in upholding the plea of a defendant charged with first degree murder who pleaded guilty to second degree murder, a State "may prohibit the practice of accepting pleas to lesser included offenses under any circumstances," but "this is not the mandate of the

Fourteenth Amendment and the Bill of Rights" (North Carolina v Alford, 400 US, at 39). (See also, State v Johnson, 134 NH 570, 575, 595 A2d 498, 501, supra ["It is well settled that a statute cannot permit a defendant who insists upon a jury trial and is convicted of capital murder to be sentenced to death, while allowing a defendant who pleads guilty to the same crime to escape the possibility of such a sentence" (emphasis supplied)].) Thus, while a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending, plea bargaining to lesser offenses even when a notice of intent is pending, or to first degree murder in the absence of a notice of intent, remains unaffected.

Given our conclusion under the Federal Constitution, we do not reach appellants' arguments under the New York State Constitution. We agree with the Appellate Division that appellants' procedural contentions in Matter of Relin are without merit.

Accordingly, in each case, the order of the Appellate Division should be reversed, without costs, and judgment granted declaring that CPL 220.10 (5) (e) and 220.30 (3) (b) (vii) are unconstitutional and are deemed severed and stricken.

Judges Bellacosa, Smith, Levine, Ciparick and Wesley concur.

In each case: Order reversed, etc.

APPENDIX C

DECISION OF THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, JUNE 10, 1998, DECLARING STATE LAW TO BE CONSTITUTIONAL

Matter of Honorable Howard R. RELIN, as Monroe County District Attorney, Petitioner, v.

Honorable John J. CONNELL, as Monroe County Court Judge, Angel Mateo, Respondents,
and
Honorable Dennis C. Vacco, Attorney General of New York State, Intervenor.

MEMORANDUM:

The People commenced this original CPLR article 78 proceeding seeking, inter alia, to prohibit respondent the Honorable John J. Connell from enforcing an order declaring CPL 220.10(5)(e), 220.30(3)(b)(vii) and 220.60(2)(a) unconstitutional. We deny that part of the petition seeking a writ of prohibition (see generally, Matter of Gold v. Gartenstein, 54 N.Y.2d 627, 442 N.Y.S.2d 504, 425 N.E.2d 892; Matter of Van Wie v. Kirk, 244 A.D.2d 13, 675 N.Y.S.2d 469 [decided herewith]). Because this issue is of critical importance and is likely to recur, we grant that part of the petition seeking, in the alternative, to convert the proceeding to a declaratory judgment action (see, CPLR 103[c]; **193 Matter of Morgenthau v. Roberts, 65 N.Y.2d 749, 751, 492 N.Y.S.2d 21, 481 N.E.2d 561; Matter of Morgenthau v. Erlbaum, 59 N.Y.2d 143, 151-152, 464 N.Y.S.2d 392, 451 N.E.2d 150, cert. denied 464 U.S. 993, 104 S.Ct. 486, 78 L.Ed.2d 682), and we grant judgment declaring those sections constitutional.

The People contend that the provisions of New York's death penalty statute governing kinds of pleas (CPL 220.10[5][e]), those governing pleas to part of an indictment or covering other indictments (CPL 220.30[3][b][vii]) and those governing the change of a plea (CPL 220.60[2][a]) do not violate respondent Angel Mateo's right to a jury trial and therefore are constitutional. We agree. Those sections do not grant a defendant the unilateral right to plead guilty and thereby avoid the death penalty, and thus they do not "needlessly encourage[ ]" guilty pleas in violation of defendant's right to demand a jury trial (United States v. Jackson, 390 U.S. 570, 583, 88 S.Ct. 1209, 20 L.Ed.2d 138; see, Matter of Hynes v. Tomei, 237 A.D.2d 52, 666 N.Y.S.2d 687; see also, Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466; North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162; Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747). Contrary to Mateo's contention, those provisions do not violate the N.Y. Constitution (see generally, People v. Seaberg, 74 N.Y.2d 1, 7, 543 N.Y.S.2d 968, 541 N.E.2d 1022). Indeed, they provide a defendant charged with a capital crime with an opportunity to plead guilty.

We have reviewed respondents' remaining contentions and conclude that they are without merit.

Consequently, we grant the petition in part, convert the proceeding to an action for a declaratory judgment and grant judgment in favor of petitioner declaring that CPL 220.10(5)(e), 220.30(3)(b)(vii) and 220.60(2)(a) are constitutional.

Petition unanimously granted in part without costs and judgment granted.

(5)

No. 03-1570

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ANGEL L. MATEO,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

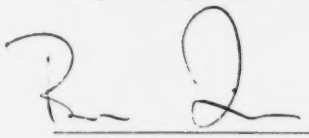
The Petitioner, ANGEL L. MATEO, who is now held in the Clinton County Correctional Facility in Dannemora, New York, asks leave to proceed on his Brief in Opposition to Petition for Writ of Certiorari without prepayment of costs and *in forma pauperis* pursuant to Rule 39 of the Rules of this Court.

Mr. Mateo's affidavit in support of this motion is attached. He was granted leave to proceed *in forma pauperis* in the courts of New York in the proceedings below. Moreover, this Court granted him leave to proceed *in forma pauperis* as respondent opposing a petition for writ of certiorari in a related case. See Hynes v. Tomei, 527 U.S. 1015 (1999).

Office of the Clerk
MAY 26 2004
FILED
Supreme Court, U.S.

This the 24th day of May, 2004.

Respectfully submitted,



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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2003

PEOPLE OF THE STATE OF NEW YORK,)
)
Petitioner,)
)
v.)
)
ANGEL L. MATEO,)
)
Respondent.)

DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, ANGEL L. MATEO, am the petitioner in the above-entitled case. In support of my motion for leave to proceed *in forma pauperis*, I state that because of my poverty, I am unable to pay the costs of this proceeding or to give security therefor; and I believe I am entitled to redress.

I further state that the statements below are true.

1. I am presently incarcerated in Clinton Correctional Facility in Dannemora, New York. I have been so incarcerated since January 1999. Prior to that, I was incarcerated in the Monroe County Jail from November 1996.

2. I am not presently employed nor have I been employed since I was incarcerated in November 1996. My spouse, Monica Szlekovics, is presently incarcerated and has been since 1996. My wife and I are estranged and I have filed for a divorce from my wife.

3. I have not received within the past twelve months — nor do I expect to receive in the next month — any income from any business, profession, employment or self-employment, real property, interest, dividends, child support, retirement, unemployment payments, public assistance, disability, or other sources.

4. The sum total of any cash or savings in my jail commissary account is $ 30.00.

5. I currently own no real estate, stocks, bonds, notes, automobiles, or other valuable property or assets.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: May 21, 2004.

Angel Mateo

ANGEL L. MATEO

No. 03-1570

In The

Supreme Court of the United States

October Term, 2003

STATE OF NEW YORK,

Petitioner,

v.

ANGEL L. MATEO,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

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Statement of the Case

In 1995, New York enacted a new death penalty statute. For a defendant convicted of first-degree murder at trial, the statute provided a maximum penalty of death where the district attorney had filed a notice of intent to seek the death penalty. See N.Y. Crim. Proc. Law §§ 250.40, 400.27. But, for a death-noticed defendant who pled guilty to first-degree murder, life imprisonment without parole was the maximum sentence. See N.Y. Crim. Proc. Law §§ 220.10(5)(e), 220.30(3)(b)(vii), 220.60(2)(a). Thus, New York's law, as enacted, reserved the death penalty for capital defendants who exercised their right to trial.

In December 1996, the Monroe County District Attorney, on behalf of Petitioner, the People of the State of New York, obtained an indictment against Respondent Angel Mateo for first-degree murder and other crimes in the County Court of Monroe County, New York. In January 1997, the District Attorney filed a notice of intent to seek the death penalty. Before his trial, Mr. Mateo challenged the capital statute as unconstitutional under this Court's ruling in United States v. Jackson, 390 U.S. 570 (1968). In Jackson, the Court had invalidated the death-penalty provision of the Federal Kidnapping Act because it allowed a death sentence for defendants who went to trial while setting a maximum penalty of life imprisonment for those who pled guilty. That statutory scheme, the Court had held, unduly and "needlessly" burdened the Sixth Amendment right to a jury trial and the Fifth Amendment privilege against self-incrimination. Id. at 582.

The trial court in Mr. Mateo's case, while agreeing that New York's statute was unconstitutional under Jackson, declined to invalidate it entirely. Instead, the trial court simply struck the plea provisions, thus barring any guilty plea to first-degree murder while a death notice

remained pending. People v. Mateo, Ind. No. 914/96, slip op. at 57 (County Ct. Monroe County Aug. 27, 1997).

The District Attorney challenged that decision in the Appellate Division of the State Supreme Court, by initiating a collateral action seeking a writ of prohibition or, alternatively, a declaratory judgment. The trial judge, the Honorable John Connell, and Mr. Mateo were respondents in that action. In June 1998, the Appellate Division declared the plea provisions constitutional. Matter of Relin v. Connell, 251 A.D.2d 1041, 1042, 674 N.Y.S.2d 192, 193 (4th Dept. 1998) (A. 106).[1] Mr. Mateo appealed that ruling to the New York Court of Appeals. That court consolidated his case with another presenting the identical issue, Matter of Hynes v. Tomei, 237 A.D.2d 52, 666 N.Y.S.2d 687 (2d Dept. 1997).

In September 1998, Mr. Mateo's criminal trial began. A jury convicted him of first-degree murder and other crimes. On December 16, 1998, after a separate sentencing proceeding, the jury returned a death verdict.

Six days later, the Court of Appeals ruled on Mr. Mateo's appeal in the declaratory judgment action. In a consolidated opinion, it reversed the Appellate Division decisions in Relin and Hynes. Matter of Hynes v. Tomei, 92 N.Y.2d 613, 706 N.E.2d 1201, 684 N.Y.S.2d 177 (1998) (A. 90). The Court of Appeals rejected the District Attorney's claims that Jackson was no longer good law and that the New York statute was somehow distinguishable from the one in Jackson. Hynes, 92 N.Y.2d at 621-27, 629 (A. 92-101, 104). But the court did not cure the defect by striking the death penalty from the statute as this Court had in Jackson. Instead, the Court of Appeals, confirming the decision of the trial court, excised the offending plea provisions, thus barring all pleas to first-degree murder

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[1] "A. ___" refers to Petitioner's Appendix, filed with the petition.

where a death notice is pending, i.e., where death is an available sentence. Hynes, 92 N.Y.2d at 627-30 (A. 101-104). This is a remedy that this Court recognized would cure a Jackson problem. Jackson, 390 U.S. at 584. The Court of Appeals thus brought New York into compliance with Jackson, joining every other death-penalty jurisdiction.

The District Attorney, together with his counterpart in the companion case, sought a writ of certiorari from this Court to review the Court of Appeals' decision in Hynes. They argued that the decision in Jackson should be reversed or modified, or alternatively, that New York's statute comported with Jackson. This Court denied the petition. Hynes v. Tomei, 527 U.S. 1015 (1999).

Thereafter, in the direct appeal of his criminal case to the Court of Appeals, Mr. Mateo challenged his death sentence because he was tried while the unconstitutional plea provisions were in effect. The Court of Appeals agreed; it vacated his death sentence and directed the trial court to resentence him to a sentence less than death. People v. Mateo, ___ N.Y.2d ___, 2004 WL 330090 (Feb 24, 2004) (A. 11).

That decision did not address the viability of Jackson or its application to New York's capital statute. The Court of Appeals had already resolved those issues in the declaratory judgment action, and neither the District Attorney (SA. 1-7)[2] nor the Attorney General (SA. 8-16) asked the court to consider them again in the direct appeal. Instead, the District Attorney's and Attorney General's briefs (SA. 1-16) and the court's decision, Mateo, ___ N.Y.2d at ___ (A. 8-11), focused on the purely state-law question of whether the Appellate Division's ruling in the declaratory judgment action holding the plea provisions constitutional had been binding at the time in Mr. Mateo's criminal case; if it had been, then the provisions were in effect when Mr. Mateo was tried. Indeed,

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[2] " SA. __" refers to Respondent's Supplemental Appendix attached to this brief.

as the Court of Appeals noted in its decision, "The People and the Attorney General concede that if the plea provisions were in effect during defendant's case, the death sentence must be vacated." Mateo, ___ N.Y.2d at ___ (A. 8). The court held that, under New York procedural law governing declaratory judgments, the Appellate Division's ruling had been binding in the criminal case; accordingly, it vacated Mr. Mateo's death sentence. Id.

Reasons Why the Petition Should Be Denied

Petitioner comes before this Court having failed to properly preserve the argument that it should overrule the decision in United States v. Jackson. Petitioner never raised that claim in Mr. Mateo's direct appeal. Moreover, had the claim been raised, the New York Court of Appeals would have rejected it on state grounds: it would have been barred under New York's *res judicata* rule, since it had been fully litigated by Mr. Mateo and the District Attorney and finally decided by the Court of Appeals in the separate declaratory judgment action. Thus, this Court lacks jurisdiction to consider this case.

Even if this Court had jurisdiction, there would be no reason for it to revisit a 36-year-old decision that has virtually no impact on modern jurisprudence. Overruling Jackson would not impact a single existing statute and would affect the cases of, at most, four defendants in New York.[3] This is simply not an issue worthy of the Court's consideration.

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[3] Other than Mr. Mateo, there are only three death-sentenced defendants with pending appeals who were indicted under the defective statute (i.e., before Hynes): Stephen LaValle, Robert Shulman, and Nicholson McCoy.

Since this Court decided Jackson, only New York has enacted a statute that conflicted with that decision. The Court of Appeals has now brought that statute into compliance with Jackson, a point Petitioner does not dispute. Thus, there is no "important federal question," Sup. Ct. R. 12, for this Court to determine.

Finally no decision of this Court conflicts with or undermines Jackson. Petitioner suggests that Jackson is inconsistent with this Court's subsequent decisions on plea bargaining. In fact, there are no such inconsistencies and those cases cite approvingly to Jackson.

A. This Court lacks jurisdiction: The federal issues were neither raised nor decided in Mr. Mateo's direct appeal and, under state procedural law, could not have been considered because they had previously been decided by a final judgement in a separate civil action between the parties.

The federal issues the petition presents were fully litigated by the District Attorney and Mr. Mateo and finally decided by the Court of Appeals in the declaratory-judgment action. (That was a final judgment, which the District Attorney unsuccessfully petitioned this Court to review.) Thus, under the state doctrine of *res judicata*, these issues could not be considered again in Mr. Mateo's direct appeal. And, in fact, Petitioner never raised them and the Court of Appeals never decided them in the direct appeal. Accordingly, this Court lacks jurisdiction.

In reviewing state court judgments under 28 U.S.C. § 1257, this Court adheres to the rule that it 'will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." Adams v. Robertson, 520 U.S. 83, 86 (1997). See Campbell v. Louisiana, 523 U.S. 392 (1998). Here, Petitioner never raised, and the Court of Appeals never addressed, the federal issues presented in the

petition — whether Jackson should be overruled and, if not, whether New York's capital plea provisions are nevertheless constitutional under Jackson.

In Mr. Mateo's direct appeal to the Court of Appeals, Petitioner assumed that United States v. Jackson was good law, that Hynes v. Tomei was correctly decided, and that the capital-plea statute invalidated in Hynes was unconstitutional. Thus, Petitioner never challenged Jackson or Hynes in the appeal that produced "the decision" this Court is now "asked to review." Adams, 520 U.S. at 86. Instead, Petitioner's brief claimed *only* that the trial court's order striking the plea provisions, not the subsequent declaratory judgment by the Appellate Division validating them, was binding in Mr. Mateo's criminal case. Accordingly, Petitioner argued, Mr. Mateo was not actually subject to the unconstitutional plea provisions when he was tried. (SA. 2-7). The New York Attorney General took this same approach to the Jackson issue in his intervenor brief. (SA. 9-16).

Thus, the only contested issue that the Court of Appeals addressed and resolved was whether the declaratory judgment was binding and the plea provisions were therefore in effect in Mr. Mateo's criminal case. Mateo, ___ N.Y.2d at ___ (A. 7-11). Indeed, early in its discussion, the court observed: "The People and the Attorney General concede that if the plea provisions were in effect during defendant's case, the death sentence must be vacated." Id. at ___ (A. 8). Of course, whether the declaratory judgment was binding was a purely state-law question, and the court treated it as such. Id. at ___ (A. 7-11). Accordingly, it never reexamined the holding of Hynes, the constitutionality of the plea statute, or the viability of Jackson. Hynes, ___ N.Y.2d ___ (A. 7-11).

It is not sufficient that Petitioner opposed, and the Court of Appeals decided, Mr. Mateo's ultimate entitlement to relief under Jackson and Hynes. This Court will not consider overturning a previously-established constitutional holding if the petitioner never challenged the holding below,

but rather simply argued that it did not apply to the case at hand. Thus, in Illinois v. Gates, 462 U.S. 213, 220-21 (1983), the Court declined to address whether there was a good-faith exception to the exclusionary rule, explaining that, while Illinois had challenged the criminal defendant's Fourth Amendment claim in the lower court, it had never specifically urged that the exclusionary rule be modified, and thus the lower court had never considered that question.

The Gates decision cited Morrison v. Watson, 154 U.S. 111 (1894). There, as in Mr. Mateo's case, "the lower court's opinion had restated the conclusion, set forth in an earlier decision of that court," about the constitutionality of a state statute. Gates, 462 U.S. at 222 (citing Morrison, 154 U.S. at 115). See Mateo, ___ N.Y.2d at ___ (A. 7-8) ("In Hynes, we struck the plea provisions as unconstitutional . . . . We break no new ground by applying" Hynes and "striking defendant's sentence of death."). "Nonetheless," in Morrison, this Court "held that there was no showing that 'there was any real contest at any stage of this case upon the point,' and that without such a contest, the routine restatement and application of settled law by an appellate court did not satisfy the 'not pressed or passed upon below' rule." Gates, 462 U.S. at 222 (quoting Morrison, 154 U.S. at 115).

Among the "practical reasons" for insisting that a petitioner present a federal issue to the state appellate court before seeking review in this Court is that it "insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon . . ." Webb v. Webb, 451 U.S. 493, 500 (1981). And indeed, such a state ground existed in Mr. Mateo's case, so that, even had Petitioner tried to challenge Jackson and Hynes in Mr. Mateo's direct

appeal from his death sentence, the Court of Appeals could and would have refused to consider such a challenge — based on the state's well-established doctrine of *res judicata*.[4]

Just over three years before the Court of Appeals decided Mr. Mateo's direct appeal, it decided his appeal in the declaratory judgment action, Matter of Relin v. Connell, together with the companion case, Hynes. In Relin, the District Attorney prosecuting Mr. Mateo, his trial judge, and Mr. Mateo were all parties. See Hynes, 92 N.Y.2d at 618-19. The Court of Appeals ruled that Jackson remained good law and the capital plea provisions were unconstitutional under Jackson. Hynes, 92 N.Y.2d at 625-30. The District Attorney and his counterpart in Hynes filed a petition to review that ruling, presenting essentially the same arguments for overruling Jackson that Petitioner now offers. This Court denied that petition. Hynes, 527 U.S. 1015.

The declaratory-judgment action in Relin was a separate proceeding from Mr. Mateo's criminal case and the Court of Appeals decision in that action was a final judgment — not an "interlocutory ruling" in the criminal case, as Petitioner now asserts. See Pet. at 6, 17. Indeed, there was jurisdiction for the District Attorney and his counterpart to seek certiorari review of the Court of Appeals decision in Hynes only *because* it was a final judgment in a separate proceeding.[5] See Rescue Army v. Municipal Court of Los Angeles, 331 U.S. 549, 553-55 (1947); People ex rel. Bryant v. Zimmerman, 278 U.S. 63, 70 (1928). See also Ohio ex rel. Eaton v. Price, 364 U.S. 263,

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[4] If the party against whom *res judicata* is applied had an adequate opportunity to participate in the prior proceeding, see Richards v. Jefferson County, 517 U.S. 793, 797 (1996), it is an adequate state ground. See Durley v. Mayo, 351 U.S. 277, 280-85 (1956).

[5] Accordingly, Mr. Mateo's brief in opposition argued that the issue was not worthy of review, but did not challenge the Court's jurisdiction. See Respondents' Brief in Opposition to Petition for Writ of Certiorari in Hynes v. Tomei and Relin v. Connell, No. 98-1533 (April 21, 1999).

267 n.3 (1960) (Opinion of Brennan, Black & Douglas JJ., & Warren, C.J.). See generally Robert L. Stern, et al., Supreme Court Practice, at 159, 161 (8th ed. 2002).

Under New York law, *res judicata* bars a criminal appellate court from revisiting an issue previously decided by final judgment in a collateral proceeding. See People v. DiRaffalele, 55 N.Y.2d 234, 243, 433 N.E.2d 513, 517, 448 N.Y.S.2d 448, 452 (1982) (refusing to consider, on direct appeal, double jeopardy issue that it had already rejected in pretrial prohibition proceeding involving defendant and prosecutor). Thus, even had Petitioner raised the federal issues below in Mr. Mateo's direct appeal, the Court of Appeals would have rejected them based on an adequate state ground, namely the *res judicata* effect of its consolidated decision in Hynes.[6]

B. Given the minimal impact of the decision below and 36 years of national conformity with Jackson, there is no "important federal question" at issue here.

This case presents no "important federal question" for the simple reason that, even were this Court to grant the petition and rule in favor of Petitioner, the result would affect, at most, four defendants in New York who were indicted under the unconstitutional statute, and not a single other case or statute there, or anywhere else in the country.

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[6] In fact, the District Attorney himself has acknowledged this: In asking this Court to stay the Court of Appeals' mandate in Hynes pending their previous petition for certiorari, he and the District Attorney in the companion case stated that the judgment in Hynes was a final one subject to Supreme Court review, and explained that because "the constitutionality of New York's capital guilty plea provisions" had already been litigated in Hynes, it "could not and would not" be an issue in Mr. Mateo's appeal from his death sentence or the criminal proceeding in the companion case. Joint Application to Stay Mandate, filed by Monroe and Kings County District Attorneys, Matter of Hynes v. Tomei and Matter of Relin v. Connell, at 27 n.9 (February 19, 1999) (SA.19).

Petitioner does not deny that every capital jurisdiction in the United States complies with Jackson. Instead, Petitioner suggests that the system most other states have settled on is really no different than the ones struck down by this Court in Jackson and the Court of Appeals in Hynes. Petitioner admits that most capital punishment states allow defendants to plead guilty and then conduct a penalty proceeding. Pet. at 13. But Petitioner asserts that in these states the possibility of death is an illusion because defendants rarely if ever receive death after a negotiated plea. Thus, Petitioner concludes that in these states, as under the statutes invalidated in Jackson and Hynes, there are only two alternatives, a trial where death is a possible sentence and a plea where it is not.

This ignores the statutory third option in those states: an open plea that leaves death as a possible sentence. It is the possibility of such pleas that differentiates these statutory regimes from ones invalid under Jackson. Nor is this third option illusory since it is not unusual for defendants in those states to plead guilty to the crime, without a negotiated agreement, and proceed to a sentencing hearing.[7]

Similarly misplaced is Petitioner's suggestion that Jackson and Hynes have somehow interfered with the administration of justice in New York. In fact, they have posed no obstacle to plea bargaining in capital cases. Numerous defendants facing the death penalty have pled guilty to

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[7] Indeed, many such guilty pleas have resulted in death sentences. See, e.g., Strickland v. Washington, 466 U.S. 668 (1984); United States v. Sampson, 300 F.Supp.2d 275 (D. Mass.2004); Davis v. State, 740 A.2d 1115 (Ala. Crim. App. 1998); People v. Livaditis, 831 P.2d 297, 9 Cal.Rptr.2d 72, 2 Cal.4th 759 (1992); People v. White, 870 P.2d 424 (Colo. 1994); Morrison v. State, 276 Ga. 829, 583 S.E.2d 873 (2003); State v. Dunlap, 873 P.2d 784 (Idaho 1993); People v. Burton, 184 Ill. 2d 1, 703 N.E.2d 49 (1998); Johnson v. Commonwealth, 103 S.W.3d 687 (Ky .2003); State v. Louiviere, 833 So. 2d 885 (La. 2002); State v. Smith, 705 P.2d 1087 (Mont. 1985); State v. Nelson, 714 A.2d 281, 155 N.J. 87 (1998); State v. Davis, 353 N.C. 1, 539 S.E.2d 243 (2000); Marshall v. State, 963 P.2d 1 (Okla. Crim. App. 1998); State v. Conyers, 487 S.E.2d 181, 326 S.C. 263 (1997); State v. Henderson, 24 S.W.3d 307 (Tenn. 2000); Matchett v State, 941 S.W. 2d 922 (Tex.Crim.App. 1996); Lewis v. Commonwealth, 267 Va. 302, 593 S.E.2d 220 (2004).

first-degree murder in return for the prosecution withdrawing the death notice just before they entered the plea, thus complying with Hynes, 92 N.Y.2d at 629 (A. 103).[8] The Court of Appeals rejected a challenge to the legality of such a plea in People v. Edwards, 754 N.E.2d 169, 754 N.E.2d 169, 729 N.Y.S.2d 410 (2001). Moreover, other death-noticed defendants have pled guilty to second-degree murder, which is also permitted by the Court of Appeals' decision in Hynes, 92 N.Y.2d at 629-30 (A. 104).[9]

Not only has Hynes had no detrimental prospective impact on capital litigation in New York; Petitioner fails to note that it also has little retrospective effect. Because Hynes cured the Jackson defect very early in the life of New York's statute, it can affect the death sentences of only Mr. Mateo and three other condemned prisoners in New York. Every other capital defendant in the state

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[8] See, e.g., People v. Steven Smelefsky, 182 Misc.2d 11, 659 N.Y.S.2d 689 (Sup. Ct. Queens County 1999). See also People v. Schroedel, 182 Misc.2d 154, 158, 697 N.Y.S.2d 904, 907 (County Ct. Sullivan County 1999) (holding that plea permissible if death notice withdrawn). Since Hynes was decided, eight defendants against whom death notices had been filed have pled guilty to first degree murder. (William Banker, Sullivan County, Ind. No. 80-98; Kendall Francois, Dutchess County, Ind. No. 0122-98; Tracey Irwin, Sullivan County, Ind. No. 80-98; Jeffrey Nabinger, Broome County, Ind. No. 02-501; Anthony Schroedel, Sullivan County, Ind. No. 115-99; Steven Smelefsky, Queens County, Ind. No. 2262-98; David Sweat, Broome County, Ind. No. 02-501; and David Van Dyne, Monroe County, Ind No. 97-0736.) Another thirteen have pled guilty to first degree murder while the district attorney was deciding whether to file a death notice. (Angel Carrasquillo, Onondaga County, Ind. No. 2000-0637-1; Alexis Casillas, Suffolk County, Ind. No. 3148-03; Albert Clarke, Kings County, Ind. No. 07717-03; Desmond Fair, Queens County, 1782-99; Darrell Gunn, Onondaga County, Ind. No. 2003-0242-1; Brandon Hall, Monroe County, Ind. No. 98-0720; Kenneth Harris, New York County, Ind. No. 02114-02; Anthony Medina, Erie County, 0116-99; Michael Mikucki, Queens County, Ind. No. 1290-99; Kelvin Owes, Monroe County, Ind. No, 2000-0161; Larme Price, Kings County, Ind. No. 1915/2003; Moo Shin, Queens County, Ind. No. 1407-03; and Frank Thon, Rockland County, Ind. No. 29-03.)

[9] Since Hynes, four such pleas have been entered. (Daniel Best, Rensselaer County, Ind. No. B-10725; Michael Hale, Kings County, Ind. No. 8776-96; Provard Jones, Jefferson County, Ind. No. 166-98; Demeris Tolbert, Kings County, Ind. No. 11616-98.)

has been and will be indicted after Hynes and thus under a statute that does not violate the decision in Jackson. Thus, the effect of Hynes and Jackson remains insignificant.

This also undermines Petitioner's claim that this Court should ignore its prior denial of a writ of certiorari presenting essentially the same arguments made here because at that point "it was still uncertain whether that decision would affect this case or any other." Pet. at 17. Now we know for certain that it will affect very few cases. Thus, the merits of the petition are even weaker than when this Court first rejected it.

C. There is no reason to consider overruling Jackson because no subsequent decision of this Court conflicts with or undermines it.

Petitioner makes several attempts to argue that subsequent decisions of the Court either are inconsistent with or undermine its decision in Jackson. These efforts are unavailing.[10]

Petitioner asserts that four decisions of this Court subsequent to Jackson, upholding the constitutionality of plea bargaining in various contexts, call into question Jackson's viability. In fact, those cases all cite *approvingly* to Jackson. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978);

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[10] Petitioner also attempts to distinguish the New York statute from the one at issue in Jackson. Petitioner argues that the New York statute is saved because it requires "consent of the prosecutor and permission of the court" before a plea can be entered, while the statute in Jackson did not. Pet. at 12-13. This is factually incorrect. As the Court of Appeals noted in Hynes in response to the same argument, "The Supreme Court, however, has found approval of a trial court and a prosecutor irrelevant to the Jackson analysis. Defendants prosecuted under the Federal Kidnaping Act could not enter a plea of guilty as of right, since Federal Trial Judges had discretion to reject guilty pleas." Hynes, 92 N.Y.2d at 623 (citing Jackson, 390 U.S. at 583) (A.95). Petitioner also fails to mention that the Supreme Court found North Carolina's capital-pleading scheme unconstitutional under Jackson. See Roseboro v. North Carolina, 403 U.S. 948 (1971). That scheme required the approval of both the trial judge and prosecutor for a defendant to plead guilty and avoid a death sentence. See Parker v. North Carolina, 397 U.S. 790, 792 n.2 (1970).

Corbitt v. New Jersey, 439 U.S. 212, 291 n.9 (1978); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Brady v. United States, 397 U.S. 742, 746-47 (1970).[11]

That approval should come as no surprise. The distinction between plea bargaining and the situation presented in Jackson is clear. In plea bargaining, a statute defines the maximum punishment for all defendants, whether they plead guilty or go to trial. The prosecution may agree to a sentence less than the maximum in exchange for a plea. The problem with the statute invalidated in Jackson, and the offending New York provision, was that, by *statute*, the maximum sentence of those who exercised their constitutional right to trial was higher than the maximum sentence of those who pled guilty, with death reserved for defendants convicted at trial. See Hynes, 92 N.Y.2d at 625 (citing Corbitt, 439 U.S. at 217-19) (A. 98).

Finally, and perhaps most telling, although 36 years have passed since Jackson, Petitioner is unable to cite a single word in *any* subsequent decision of this Court calling the holding of that case into question. Indeed, this Court has cited affirmatively to Jackson as recently as five years ago. See Saenz v. Roe, 526 U.S. 489, 499 n.11 (1999).

In light of all this, it is no wonder that Petitioner makes no reference to this Court's *stare decisis* jurisprudence. *Stare decisis* yields only where subsequent decisions of the Court have eroded a prior decision's underpinnings, see United States v. Gaudin, 515 U.S. 506, 521 (1995), or where

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[11] Petitioner also asserts that, by citing Jackson in a footnote to their opinion in Gregg v. Georgia, three judges of this Court suggested that the advent of bifurcated capital trials rendered Jackson obsolete. Pet. at 12 (citing Gregg v. Georgia, 428 U.S. 153, 192, n. 41 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)). On the contrary, that footnote simply compared the way a unitary trial system unfairly discouraged capital defendants from presenting mitigating sentencing evidence by allowing its use to convict them, with the scheme it invalidated in Jackson, which similarly "'chill[ed] the assertion of constitutional rights by penalizing those who choose to exercise them . . . ." Id. (quoting Jackson, 390 U.S. at 581).

the prior decision has splintered the Court and has "baffled and divided the lower courts that have considered it." Nichols v. United States, 511 U.S. 738, 743-46 (1994). These considerations are entirely absent here. There is no reason for the Court to revisit Jackson, much less reverse it.

Conclusion

For the foregoing reasons, Mr. Mateo respectfully submits that this Court should deny the Petition for a Writ of Certiorari to the New York Court of Appeals.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX

Excerpt From Monroe County District Attorney's Brief in the New York State Court of Appeals in People v. Mateo.

Pages 126 though 131

POINT FOURTEEN

THE PLEA RESTRICTION IN THIS CASE WAS CONSISTENT WITH HYNES V. TOMEI
(Answering Appellant's Point XIV)

Appellant urges, perhaps most fervidly, that his death sentence must be set aside because he was "tried under statutory provisions that this Court later held unconstitutional in Matter of Hynes v. Tomei," 92 N.Y.2d 613 (1998). The answer is that he received all he was entitled to under that case: a trial unimpeded by those provisions and thus consistent with United States v. Jackson, 390 U.S. 570 (1968). Because the trial court, like this Court, invalidated sections 220.10(5) and 220.30(3)(b)(vii) of the Criminal Procedure Law, he was never "faced with the choice that Jackson declared unconstitutional: exercise Fifth and Sixth Amendment rights and risk death, or abandon those rights and avoid the possibility of death." Hynes, 92 N.Y.2d at 626.

Appellant overstates Hynes as having held that "the capital statute is unconstitutional." The Court made it clear that it was not required to, and therefore did not, invalidate the death penalty because it was able to craft a narrower remedy, which left the law intact except that "a defendant may not plead guilty to murder in the first degree when a notice of intent to seek the death penalty is pending." This barrier is sufficient to "obviate the Jackson problem [because] excision of the capital pleading provisions eliminates the burden on constitutional rights prohibited by Jackson." Id. at 628. Indeed, Jackson invited just such an accommodation. The Government proposed that the Supreme Court exercise its supervisory power to prohibit district courts from accepting pleas under such circumstances, so that "every defendant charged in

federal court with aggravated kidnaping would face a possible death penalty." The Supreme Court declined to do so on the ground that the impetus for such a change "must come from Congress" and the statute could not "be saved by judicial construction." 390 U.S. at 584-85. New York's statute, by contrast, could be and was saved by this Court because the Legislature expressly authorized it to do so by enacting a severability clause and because it was structurally possible to excise those two clauses in a way that the federal kidnaping statute did not permit.

Appellant does not invite the court to revisit Hynes so much as he argues that its saving construction does not, and cannot be, applied to this case because it was already in the pipeline. The "does not" argument is wrong because the same construction was placed on the statute by the trial court in this case and, unlike People v. Harris, 98 N.Y.2d 452 (2002), the Jackson infirmity did not operate. The "cannot" argument is wrong because it confuses a court's power and duty to construe a statute constitutionally with the inability of a legislature to enact a law which has the effect of enhancing the penalty for a crime that has already occurred.

The court below correctly anticipated the decision in Hynes by holding the same plea provisions, plus another clause that this Court viewed as inconsequential, as unconstitutional for the same reason. Like this Court, it refused to find the entire statutory procedure for imposing the death penalty punishment invalid and instead struck so much of the law as was necessary to assure that "there is now no provision for the defendant to enter a plead of guilty in this death-eligible case," which it, too, viewed as one in which a notice of intent to seek the death penalty had been filed and not withdrawn. R. 17365-66. Although that was assuredly not everything

that appellant asked for, it was everything to which he was entitled under Hynes in order to eliminate the "unnecessary and therefore excessive" consequence of risking a possible death sentence for having exercised his Fifth and Sixth Amendment rights. 92 N.Y.2d at 621.

Appellant answers, first, that while that remedy might have been adequate while it was in effect, it did not exist until he sought and obtained it and that between the filing of that notice and the court's decision, he was "subject" to an unconstitutional statute. By waiting until after the notice was filed to seek relief, he argues, he placed himself in the win-win position of being aggrieved by a statute that he succeeded in invalidating. But the question is whether he was "subject" to an incurable constitutional wrong from the beginning or whether, as he elsewhere describes the issue, whether it would have been wrongful to have "tried" him under statutory provisions that this Court later held to be unconstitutional.

The answer is that the wrong would have accrued only at trial because, as the Court explained in People v. Edwards, 96 N.Y.2d 445, 453 (2001), what is unconstitutional under Jackson are not guilty pleas "encouraged by a fear of a possible death sentence," but laws that impose that penalty only on those defendants "ingenuous enough to seek a jury acquittal" while at the same time exempting those who plead guilty to the same charge. What is offensive is not the inducement, the Court reasoned, but the "impermissible burden" that such a "two-tiered penalty structure imposes on a defendant's assertion of his or her constitutional rights." Id. Thus, the "carrot" which the statute offered appellant if he had pleaded guilty did not subject him to a Jackson violation any more than it did Edwards. And, unlike Harris, he did not suffer the

"stick" of capital punishment because he chose to exercise his Fifth and Sixth Amendment rights. Once the court below ruled as it did, he was left with "no choice but to go trial." People v. Parker, 755 N.Y.S.2d 521 (4th Dept. 2003).

But, he argues, the window of opportunity was opened again because the People, in an unsuccessful attempt to reverse that ruling, obtained a declaratory judgment that the statute was constitutional as drafted. Matter of Relin v. Connell, 251 A.D.2d 1041 (4th Dept. 1998), rev'd sub nom. Hynes v. Tomei, supra. Although appellant now insists that the trial court was bound by that judgment to have considered a guilty plea if the parties had agreed to one, he correctly conceded, at page 31 of his brief to this Court, that the collateral proceeding had no effect on this case because the Court has "consistently and unequivocally held that a declaratory judgment regarding a criminal prosecution does not apply in the underlying criminal case." E.g., Matter of Bower & Gardner v. Evans, 60 N.Y.2d 781 (1983); Matter of Morgenthau v. Erlbaum, 59 N.Y.2d 143, 152 (1983); see David Siegel, New York Practice (3d ed. 1999) 709 (declaratory judgment is prospective and thus does not apply to "specific criminal case that triggered the declaratory action").

The trial court did not pass on whether its prior order was still operative, finding the question "kind of moot" inasmuch as "no plea under any circumstances" was in the offing. Whatever the Appellate Division's opinion, as far the prosecution was concerned, there was "no plea offer" and, appellant confirmed, "Ain't nobody taking it." R. 9078, 9123-24. While the defense did make a last minute overture, the prosecution adhered to its position that the case

warranted the death penalty. Accordingly, under the law of the case, as it stood and as ultimately vindicated by Hynes, appellant had "no choice but to go to trial" at the point he did. R. 6022.

Appellant is therefore wrong to read Harris as authority for reversal of any capital case in the judicial system at the time Hynes was decided. Not only did the trial court in Harris fail to hold that Jackson prevented a post-notice plea to first degree murder with life imprisonment, it permitted plea negotiations to reach a stage where, as appellant confirms, the defense accepted the offer and was rebuffed only because Harris would not admit his guilt to the satisfaction of the court and the prosecutor. Thus, he did have a choice as to whether to go to trial or to plead guilty and he faced death only because he exercised his Fifth Amendment right against self-incrimination: precisely the evil that Hynes v. Tomei, like the trial court here, remedied. As the People conceded, if Hynes remained the law, Harris's sentence would have to be vacated, as it was. 98 N.Y.2d at 496. And although we continue to believe that Jackson has not stood the test of time, the Court need do nothing more today than recognize that the trial court, by having excised enough of the statutory language to assure that "that a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending," satisfied the Constitution. Hynes, 92 N.Y.2d at 629.

Finally, appellant argues that Hynes must be applied so as to vitiate the death sentence in any State case in which an indictment was returned before December 22, 1998, because the Supreme Court summarily afforded such retroactive relief in four North Carolina cases that had been tried after that state's legislature repealed its similarly unconstitutional plea provisions.

This argument again ignores the difference between what the Supreme Court did by striking the death penalty and requiring new legislation to validly reinstate it, and what this Court did in excising the offending provisions and otherwise leaving the law intact. As the dissenting opinion in one of the North Carolina cases explains, the Jackson remedy meant that there was no valid death penalty in effect in that State at the time those defendants committed their crimes. To construe the legislative repeal of the offending plea provisions as retroactively validating such a sentence, those judges reasoned, would "provide greater punishment for murder in the first degree than the punishment provided therefor when the crime was committed" and would therefore constitute an unconstitutional ex post facto law. "In our view, if the death penalty provisions * * * were invalid in October, 1968, when the crime was committed, they were invalid as to this defendant in April, 1969, when he was tried, convicted and sentenced." State v. Williams, 174 S.E.2d 503, 510-11 (Bobbit, Ch. J. and Sharp, J., dissenting). By contrast, the operative law enacted by New York in 1995 remains valid. By striking so much of the statute as allowed a plea of guilty to murder in the first degree while a notice of intent to seek the death penalty is pending, this Court did not "inflict a greater punishment than the law annexed to the crime when committed" in violation of the ex post facto clause. Nor, for that matter, is that doctrine even applicable to judicial decisions. Rogers v. Tennessee, 532 U. S. 451, 456 (2001) ("as the text of the Clause makes clear, it is a limitation on the powers of the Legislature").

For the same reasons, it would not be unconstitutional, under either Hynes or the ex post facto clause, to expose appellant to the same penalty in the event of a retrial.

Excerpt From the New York State Attorney General's Brief in the New York State Court of Appeals in People v. Mateo.

Pages 7 though 14

ARGUMENT

POINT I

DEFENDANT'S FIFTH AND SIXTH AMENDMENT RIGHTS WERE NOT IMPERMISSIBLY BURDENED BY THE FIRST-DEGREE MURDER GUILTY PLEA PROVISIONS, BECAUSE THE TRIAL COURT STRUCK THOSE PROVISIONS AS UNCONSTITUTIONAL PRIOR TO THE START OF DEFENDANT'S TRIAL (Answering Defendant's Brief, Point XIV).

Defendant was not subjected to the unconstitutional dilemma that this Court identified in Matter of Hynes v. Tomei, 92 N.Y.2d 613 (1998), cert. denied, 527 U.S. 1015 (1999), and that led to the vacatur of the death sentence imposed upon defendant Darrel K. Harris. See People v. Harris, 98 N.Y.2d 452 (2002). To the contrary, before the start of defendant's trial, the trial judge struck as unconstitutional the first-degree murder guilty plea provisions that this Court later declared unconstitutional, and as this Court did in Hynes v. Tomei, construed the resulting statute as precluding a guilty plea while a death penalty notice was pending (R. 17364-17367). Thus, as to this defendant, the statute "at the time of defendant's trial" did not "impermissibly discourage[] defendant's assertion of this Fifth and Sixth Amendment rights," Harris, 98 N.Y.2d at 496, and the unconstitutionality of the plea provisions provides no basis upon which to vacate his death sentence.

In Hynes v. Tomei, 92 N.Y.2d at 620, this Court struck the statutory provisions allowing a defendant to plead guilty to first-degree murder, with the consent of the prosecutor and the approval of the court, on the ground that the statutory scheme was unconstitutional under United States v. Jackson, 390 U.S. 570 (1968), because it "explicitly provide[d] two levels of penalty for the same offense, imposing death only on those who assert innocence and proceed to trial." Id.

According to the Hynes Court, this scheme "impermissibly burdened" a defendant's exercise of constitutional rights, because "only those defendants who exercise the Fifth Amendment right against self-incrimination and the Sixth Amendment right to a jury trial put themselves at risk of death," while, at the same time, a defendant who "abandons his right to contest his guilt before a jury is assured that he cannot be executed." 92 N.Y.2d at 623, 625 (quoting United States v. Jackson, 390 U.S. at 581). Such a procedure could not be sustained, because it offers a reward for waiving a fundamental right, or imposes a penalty for asserting it. Id. at 621.

Critical to its determination was the Hynes Court's conclusion that the stricken guilty plea provisions allowed a defendant to plead guilty while a death notice was pending. Thus, the Jackson dilemma could be corrected by striking only the guilty plea provisions and "interpret[ing] the statute as prohibiting a guilty plea to capital murder while such a death penalty notice was pending," Matter of Francois v. Dolan, 95 N.Y.2d 33, 36 (2000), rather than by striking the death penalty in its entirety. Under the resulting statutory scheme, there is no impermissible burden on a defendant's constitutional rights, because there is only one maximum penalty for first-degree murder -- a death sentence. Hynes v. Tomei, 92 N.Y.2d at 628.

In People v. Harris, 98 N.Y.2d at 495-96, the Court vacated the death sentence imposed upon a defendant who had gone to trial while the unconstitutional scheme was in effect. While defendant contends that his case is "analogous" to Harris's (Defendant's Brief at 323), that is not so. Defendant Harris had likewise moved to strike the unconstitutional guilty plea provisions, and his motion was denied;[4] consequently, he was tried pursuant to a Jackson-violative statute.

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[4]See Court of Appeals Brief for Defendant-Appellant in People v. Darrel K. Harris, Point II, p. 89.

Defendant Mateo, in contrast, had his relief granted; the trial court struck the offending provisions, and he was tried under a statute that conformed with Jackson. Accordingly, as a result of his own successful motion, defendant Mateo was prosecuted under a statutory scheme that did not offer him "a reward for waiving a fundamental constitutional right, or impose a harsher penalty for asserting it." Id. at 495 (quoting Hynes v. Tomei, 92 N.Y.2d at 621). Rather, at the time of trial, Mateo faced only a single maximum sentence -- the death penalty -- and he had no choice but to proceed to trial, because the court had interpreted the statute as forbidding a guilty plea. As a result, there could have been no burden on defendant's Fifth and Sixth Amendment rights, let alone an impermissible one, and he therefore is not entitled to vacatur of his death sentence as a result of the unconstitutional guilty plea provisions.

Defendant makes two principal arguments in support of his claim that, like Harris, he is entitled to vacatur of his death sentence. First, he claims that the fact that Justice Connell had stricken the unconstitutional provisions is irrelevant, because the Fourth Department subsequently declared the provisions constitutional, and that decision "was binding precedent" even though it did not technically constitute a vacatur of Justice Connell's decision (Def. Brf. at 327-28). Second, he claims that, regardless of whether he was subjected to the unconstitutional provisions at the time he went to trial, his death sentence is invalid because he was subject to the unconstitutional provisions at least during the seven months between the filing of the death penalty notice and the trial court's decision finding the provisions unconstitutional. Both of these claims are without merit.

Defendant's argument that the Fourth Department's decision was binding legal precedent that meant that he was subject to the unconstitutional provisions at the time he went to trial

ignores settled law from this Court as to the legal effect of a decision in a declaratory judgment action. In Matter of Morgenthau v. Erlbaum, 59 N.Y.2d 143, 148 (1983), this Court held that a declaratory judgment "cannot be executed upon so as to compel a party to perform an act or to surrender property." Instead, it "only provides a declaration of rights between parties that, it is hoped, will forestall later litigation." Id. As a result, a declaratory judgment action attacking a trial court's interlocutory ruling "*may* be granted when the controversy is over the validity of a statute, . . . and there is no immediate attempt to prevent the criminal court from proceeding on the course which it has charted by its ruling." Id. at 151-52 (emphasis in original). Indeed, in this situation, the appropriate parties to a declaratory judgment action "do not include the individual defendant in the case where the challenged ruling was made," and the action "cannot seek an injunction against the individual defendant or the criminal court." Id. at 152.

Morgenthau v. Erlbaum therefore makes it clear that, as to defendant Mateo, the Fourth Department's June 10, 1998, declaration that the plea provisions were constitutional had no legally binding effect, and that the existence of that declaration -- which was already pending further review in this Court when defendant's trial commenced on September 1, 1998 -- did not place him in the same position as defendant Harris. In other words, the only "binding" precedent in defendant Mateo's case on September 1, 1998, was Justice Connell's August 25, 1997, decision striking the offending provisions as unconstitutional.[5] As a result, defendant is simply

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[5]As he made clear in his Appellate Division brief in response to the District Attorney's declaratory judgment action, Justice Connell did not consider himself bound by any decision rendered in that proceeding (R. 7982 (any declaration "could not be applied to this case, but would only control the outcome of other cases")).

wrong in contending that, like Harris, he was subjected to those unconstitutional provisions at the time he went to trial.

Nor is there any merit to defendant's second claim -- that even if he was not subject to the unconstitutional provisions at the time he went to trial, he is nonetheless entitled to vacatur of his conviction because he was subject to those provisions between the time the death penalty notice was filed and the time the provisions were stricken. As an initial matter, in Harris, this Court focused on the commencement of the trial in determining that the defendant had been placed in a Hynes/Jackson dilemma. People v. Harris, 98 N.Y.2d at 495-96 ("[a]ll seven of us agree that the statute at the time of defendant's trial impermissibly discouraged defendant's assertion of his Fifth and Sixth Amendment rights" (emphasis added)). Thus, unlike the case in Harris, when the unconstitutional provisions were stricken well before the commencement of Mateo's trial, it cannot be said that his constitutional rights were similarly burdened.

Moreover, it makes sense that the date of the trial is the significant event triggering a Hynes/Jackson dilemma, as opposed to some earlier date such as the date of the filing of the death penalty notice. After all, in the context of a Jackson/Hynes dilemma, the constitutional rights that are burdened by the defective provisions -- the Fifth Amendment right against self-incrimination and the Sixth Amendment right to a jury trial, Hynes, 92 N.Y.2d at 620 -- are quintessential trial rights. Logically, these rights are exercised, and therefore impermissibly burdened, only when a defendant either chooses to reject an offer to plead guilty or actually proceeds to trial.[6]

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[6]The Hynes Court also noted that capital defendants "who are awaiting trial and are offered a plea are still faced with the choice Jackson declared unconstitutional: exercise Fifth and (continued...)

Decisions from the Supreme Court also seem to support the conclusion that the relevant triggering date is the date of trial. For instance, in Parker v. North Carolina, 397 U.S. 790, 794-95 (1970), a case dealing with the effect of a Jackson defect on a defendant who had pleaded guilty, the Court noted that "[i]t may be that under United States v. Jackson, 390 U.S. 570 (1968), it was unconstitutional to impose the death penalty under the statutory framework which existed in North Carolina at the time of Parker's plea" (emphasis added). Notably, the Court did not seem concerned with the statute in effect at the time the defendant was charged with the capital crime, but only the moment when the defendant made the actual choice to plead guilty.

Moreover, although defendant places great reliance on the Supreme Court's summary reversals of a number of capital convictions from North Carolina, in which the defendants went to trial after Jackson-defective plea provisions had been repealed, see Atkinson v. North Carolina, 403 U.S. 948 (1971); Hill v. North Carolina, 403 U.S. 948 (1971); Roseboro v. North Carolina, 403 U.S. 948 (1971); Sanders v. North Carolina, 403 U.S. 948 (1971); Williams v. North Carolina, 403 U.S. 948 (1971), that reliance is misplaced for a number of reasons.

First, these summary opinions contain no analysis, and it is not clear whether these reversals were necessary because the defendants were actually charged with a capital crime under a Jackson-defective statute, or merely because they may have committed the crime while the defective statute was in existence. See, e.g., State v. Roseboro, 171 S.E.2d 886 (Sup. Ct. N.C.

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*(...continued)
Sixth Amendment rights and risk death, or abandon those rights and avoid the possibility of death." Id. at 626. Significantly, here, however, defendant Mateo was never offered a plea bargain (Def. Brf. at 327), and as defendant himself concedes, he would not have agreed to plead guilty if such an offer had been made (Def. Brf. at 327; R. 9124; R. 7824-25 (noting, in opposition to declaratory judgment action, that no plea offer had been made or sought)).

1970), rev'd, 403 U.S. 948 (1971) (Jackson-defective guilty plea provision was repealed eight months after the indictment was returned and 43 days before the defendant's trial). And, interestingly, when this Court discussed these cases, it observed that the "Supreme Court reversed the death sentences of defendants who had gone to trial under statutory schemes that ran afoul of Jackson." People v. Harris, 98 N.Y.2d at 495 (emphasis added). Thus, this Court apparently considered these cases to stand for the proposition that the commencement of trial was the relevant date in determining whether or not a defendant has suffered injury from a Jackson-defective statute.

Second, the defective North Carolina statute contained a fundamental difference from New York's statute that renders these cases inapposite. Significantly, a North Carolina defendant automatically became eligible to receive a death sentence the moment he or she was charged with a capital crime, with no requirement that the prosecutor make an affirmative decision to seek a death sentence. See State v. Spence, 164 S.E.2d 593, 600 (Sup. Ct. N.C. 1968) (Bobbitt, J. concurring in part, dissenting in part).[7] Thereafter, if the defendant tendered a guilty plea to first-degree murder, a separate -- unconstitutional -- statute provided that "the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life" Id. at 601 (quoting G.S. § 15-162.1). As a result, it was at least arguable that a defendant's constitutional rights may have been burdened merely by his being charged with a capital crime under the defective

[7]G.S. § 14-17 provided that a defendant convicted of first-degree murder "shall be punished with death" unless the jury recommended life imprisonment.

statutory scheme. But that argument has no force in New York, where death eligibility is not automatic.

Finally, the Supreme Court's decision to vacate these death sentences in 1971 must be placed in historical context. The Court's decision was made only one year before the Court found that the death penalty, as it was then implemented, violated the Eighth Amendment. See Furman v. Georgia, 408 U.S. 238 (1972). These decisions also pre-dated by seven years the Court's decision in Corbitt v. New Jersey, 439 U.S. 212, 219 (1978), in which it held that a state may permissibly encourage a guilty plea by offering "substantial benefits" to a defendant in return for the plea. In reaching that conclusion, the Court acknowledged that not every burden on a defendant's "exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." Id. at 218-19. Thus, while the Supreme Court has never explicitly overruled Jackson, see Hynes v. Tomei, 92 N.Y.2d at 625, n.5, reliance on 30-year-old caselaw developed in a markedly different legal landscape is of questionable value today. And such reliance becomes even more attenuated when, as explained above, the New York statutes under which defendant was charged and convicted contain significant differences from the statutes under consideration in the Supreme Court's prior cases.

Accordingly, since Mateo, unlike Harris, did not suffer an actual burden on his Fifth and Sixth Amendment rights because he did not proceed to trial under a Jackson-defective statute, his challenge to his death sentence on this ground should be summarily rejected.

Excerpt From the Monroe and Kings County District Attorneys' Application to Stay the Mandate of the Court of Appeals of the State of New York Pending Certiorari in Hynes vs. Tomei and Relin vs. Connell.

Pages 1, 27 to 28

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CHARLES J. HYNES,
as District Attorney of
Kings County, State of New York,

Petitioner,

v.

ALBERT TOMEI, as Justice of the
Supreme Court of the State of
New York, County of Kings, and
MICHAEL SHANE HALE,

Respondents.

HOWARD R. RELIN,
as District Attorney of
Monroe County, State of New York,

Petitioner,

v.

JOHN J. CONNELL, as Judge of the
County Court, Monroe County,
State of New York, and ANGEL MATEO,

Respondents.

ELIOT L. SPITZER, Attorney General
of the State of New York,

Intervenor.

APPLICATION TO STAY MANDATE OF THE COURT OF APPEALS OF THE STATE OF NEW YORK PENDING CERTIORARI

To the Honorable Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Second Circuit:

the Court of Appeals, the equities balance in favor of the granting of a stay.[9]

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[9] While state appellate proceedings remain pending in the case of People of the State of New York v. Angel Mateo, the judgment of the Court of Appeals is a final judgment in the civil declaratory judgment actions entitled Matter of Hynes v. Tomei and Matter of Relin v. Connell. Thus, the judgment of the Court of Appeals is subject to review by this Court pursuant to 28 U.S.C. § 1257(a) (1993). See e.g. Harris v. Washington, 404 U.S. 55, 56, 92 S.Ct. 183, 184 (1971). Moreover, because Mateo has litigated the issue of the constitutionality of New York's capital guilty plea provisions and prevailed, he could not and would not raise this issue again on any direct appeal to the New York appellate courts. Thus, because the People of the State of New York could never otherwise obtain review of the Court of Appeals' judgment, this Court may review the case upon granting a petition for a writ of certiorari. See Pennsylvania v. Ritchie, 480 U.S. 39, 47, 107 S.Ct. 989, 996 (1987); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 481, 95 S.Ct. 1029, 1039 (1975) (exception applies where review of a federal issue cannot be had, regardless of the ultimate outcome of the case in which further proceedings are pending).

Moreover, although Michael Shane Hale has pleaded guilty to Murder in the Second Degree and other felonies, the case of Hynes v. Tomei is not moot. The judgment of the Court of Appeals remains in effect and will control all future first degree murder prosecutions in which a notice of intent to seek the death penalty is filed. Thus, the People of the State of New York will never be able to obtain review of the Court of Appeals's determination because it will never again be able to offer or complete a plea to Murder in the First Degree in exchange for a sentence of life imprisonment without parole unless the notice of intent to seek the death penalty is withdrawn. See Democratic Party of United States v. Wisconsin, 450 U.S. 107, 115, 101 S.Ct. 1010, 1015, n. 13 (1981) (case involving Wisconsin system for selecting delegates to Presidential nominating convention not moot because "[t]he effect of the order 'remains and controls future elections'", quoting from Moore v. Ogilvie, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494 (1969). Hence, the underlying dispute between the parties is one "capable of repetition, yet evading review." Nebraska Press Ass'n. v. Stuart, 427 U.S. 539, 546, 96 S.Ct. 2791, 2797 (1976); Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515, 31 S.Ct. 279, 283 (1911). In addition, the plea agreed to by Hale does not prohibit him from subsequently collaterally attacking his plea and/or sentence in either state court or by way of a habeas corpus petition in federal court.

(f) Conclusion

For the foregoing reasons, petitioner requests that an order be entered directing that the mandate of the New York Court of Appeals be recalled and stayed, pending completion of certiorari proceedings before this Court.

Respectfully submitted,

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February 19, 1999

Supreme Court, U.S.
FILED
JUN 14 2004
OFFICE OF THE CLERK

No. 03-1570

In The

Supreme Court of the United States

STATE OF NEW YORK,

Petitioner,

-against-

ANGEL L. MATEO,

Respondent,

ELIOT L. SPITZER as Attorney General of New York,

Intervenor-Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

PETITION'S REPLY IN SUPPORT OF A WRIT OF CERTIORARI

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QUESTION PRESENTED ON REPLY

Whether this Court has jurisdiction over the appeal. This issue was so developed in the Brief in Opposition that Petitioner respectfully submits that it constitutes a "new point[] raised in the brief in opposition" under Rule 15 (6). This brief does not attempt to reply to any other issues relating to the merits of the appeal.

PARTIES TO THE PROCEEDING

The Petitioner is the State of New York (Michael C. Green, District Attorney, Monroe County).

The Respondents are Angel Mateo, Defendant/Appellant below, and Eliot Spitzer, Attorney General of the State of New York, Intervenor below.

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REASON FOR GRANTING THE WRIT

Respondent argues in his Brief in Opposition that this Court lacks jurisdiction because "the federal issues were neither raised nor decided in Mr. Mateo's direct appeal." *Respondent's Brief in Opposition* , p. 5; *see* 28 U.S.C. § 1257. Respondent argues in support of this proposition that, because the issue whether his Fifth and Sixth Amendment rights were impermissibly burdened within the meaning of *United States v. Jackson*, 390 U.S. 570 (1968) was fully litigated in the related case of *Matter of Hynes v. Tomei, Matter of Relin v. Connell*, 92 N.Y.2d 613 (1998), *cert. denied,* 527 U.S. 1015 (1999) (*"Relin"*), that final decision bars re-litigation of the issue upon the independent and adequate state ground of *res judicata*. Respondent's arguments miscomprehend both the implications of the state court proceedings and the nuanced and pragmatic approach this Court has taken to determining its scope of review.

28 U.S.C. § 1257 (a), defines the state court certiorari jurisdiction of this Court: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where ... the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution ...." There can be no question that this petition seeks review of a "final judgment" within the meaning of this section. "The final judgment against a defendant in a criminal proceeding is the sentence." Robert L. Stern, *et al.*, *Supreme Court Practice*, at 159 (8th ed. 2002). Indeed, reviewing the propriety of a sentence prior to sentence actually being imposed would be, at best, such a hypothetical endeavor that this Court could not properly entertain such an appeal. *See generally Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 570, n. 34 (1947) ("It has long been the Court's 'considered practice not to decide abstract, hypothetical or contingent questions'"). Thus, while the issue of the Constitutional validity of the

plea provisions of the New York death penalty statute was decided in the related *Relin* litigation, whether the death sentence could be Constitutionally imposed here is a question that could properly be raised only on appeal from this final judgment imposing that sentence.

The question then is whether the validity of defendant's death sentence under the Fifth and Sixth Amendments of the Constitution was properly "drawn in question" below. 28 U.S.C. § 1257 (a). That depends on whether the issue was "either addressed by, or properly presented to, the state court that rendered the decision [this Court has] been asked to review" (*Adams v. Robertson*, 520 U.S. 83, 86 [1997]) - the so-called "pressed or passed upon" rule. *Illinois v. Gates*, 462 U.S. 213, 219 (1983). Because the *Jackson* issue was central to this litigation throughout its course, from the trial court's decision in this case, to the Court of Appeals' decision in the related *Relin* case, to the ultimate vacating of the death penalty on this direct appeal, the issue is preserved for this Court's review.

A. The question raised in the petition was "pressed and passed upon" below.

The gravamen of this Petition is that imposition of the death penalty in this case does not impermissibly burden the exercise of Respondent's Fifth and/or Sixth Amendment rights. Respondent on his direct appeal to the Court of Appeals rested his argument for vacating his death sentence squarely on these same Federal Constitutional grounds. Specifically, Respondent argued that

> under the very Supreme Court decisions this Court relied on in *Relin*, ... a defendant may not be sentenced to death if, at *any* time prior to trial, he was subject to a statute unconstitutional under *United States v. Jackson*, 390 U.S. 570 (1968). Three years after Jackson, the Supreme Court summarily reversed the death sentences in four North Carolina cases."

Defendant/Appellant's Brief to the New York Court of Appeals, at 328, *citing Roseboro v. North Carolina*, 403 U.S.

948 (1971), *et al.* Indeed, Respondent made it even clearer that his argument rested squarely on Federal grounds - specifically this Court's decision in *Jackson* - contending that "[t]he logic of *Jackson* dictated these outcomes [i.e. *Roseboro, et al.*]. *Jackson* is violated by a death sentence imposed after trial when a state statute provided that the defendant faced a lesser maximum sentence upon a guilty plea." *Defendant-Appellant's Brief*, at 329. This paraphrases Petitioner's Statement of the Question Presented here: "Whether it is unconstitutional for a state law to permit a defendant who is facing the death penalty to plead guilty and be assured a prison sentence instead." *Petition for a Writ of Certiorari*, at i.

In response, Petitioner in our brief to the Court of Appeals argued that the "*Jackson* problem," i.e., the "'impermissible burden' that such a two-tiered penalty structure imposes on a defendant's assertion of his or her constitutional rights," had actually been obviated by the trial court's excission of the offending plea provisions - the same remedy the Court of Appeals' ultimately afforded in *Relin* - and thus there was no Constitutional impediment to imposition of the death penalty. *Respondent's Brief to New York State Court of Appeals,* at 128, 126. Petitioner also made it clear that "we continue to believe that Jackson has not stood the test of time." *Id.*, at 130.

Thus, the essential question presented in this petition was presented to the Court below. This Court's "jurisdiction does not depend on citation to book and verse," and the question whether the decisions below were consistent with this Court's decision in *Jackson* is properly before the Court. *Eddings v. Oklahoma*, 455 U.S. 104, 114, n. 9 (1982). At worst, the argument presented in the petition is "'only an enlargement of the one" presented to the Court of Appeals, or "so connected with it in substance as to form but another ground or reason for'" upholding the death penalty in this case. *Gates, supra*, 462 U.S., at 220, *quoting Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899). In either case, the issue is properly presented.

Moreover, that Petitioners continued to press the *Jackson* argument on this direct appeal is demonstrated by the fact that the Court of Appeals necessarily, and explicitly, "passed upon" it. In concluding the section of its opinion striking the death penalty, the Court held: "Exactly the situation *Jackson* held untenable ... occurred here ... defendant's Fifth and Sixth Amendment trial rights were burdened and he was tried under an unconstitutional two-tiered penalty scheme." *People v Mateo*, ___ N.Y.3d ___ (A. 10). Thus, the court squarely held that the death sentence in this case had to be vacated for "[e]xactly" the same reasons set forth in *Jackson*, which is the very issue presented in this Petition. Moreover, the Court of Appeals "could not have given judgment [vacating Respondent's death sentence] without deciding" these Fifth and Sixth Amendment claims, and "[i]n such case[s] ... the federal question sufficiently appears." *Dewey, supra*, 173 U.S. at 199; *see also People ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928) ("If the necessary effect of the judgment has been to deny the claim, that is enough").

The Court of Appeals' decision here does indicate that "The People ... concede that if the plea provisions were in effect during defendant's case, the death sentence must be vacated." A. 8. However, that statement reflected nothing more than an acknowledgment that the *Relin* decision was the law of the case. Petitioner continued to argue, as we had throughout the course of this litigation, that Respondent's Fifth and Sixth Amendment rights were not unduly burdened at any point. To be sure, the particulars of that argument were expressed differently based upon the different turns the litigation took as both *Relin* and the direct case continued their parallel journeys through the New York courts. But the essential Constitutional issue - the alleged violation of Respondent's Fifth and Sixth Amendment rights - has remained constant.

B. The question raised is reivewable because it was "pressed and passed upon" in *Relin*.

In any event, as Respondent effectively admits in his

Brief in Opposition (p. 8), the *Jackson* issue was "pressed or passed upon" in the related *Relin* case. *Relin* originated out of the trial court's decision in this very case, and in substance, if not form, it was simply an appeal from an interlocutory order in this case. Thus, the issue is preserved for review here.

This Court has repeatedly held that issues raised in interlocutory appeals are properly considered on appeal from the final judgment, regardless whether the state court considers their resolution the "law of the case" on subsequent review (*see Jefferson v. City of Tarrant, Ala.* , 522 U.S. 75, 83 [1997] ["Even if the Alabama Supreme Court adheres to its interlocutory ruling as 'law of the case,' that determination will in no way limit our ability to review the issue on final judgment"]; *California v. Rooney*, 483 U.S. 307, 311-312 [1987]; *Urie v Thompson*, 337 US 163, 173, n. 12 [1949]), or whether the parties simply do not re-litigate the issue for that very reason (*see id.* at 171 ["it was not necessary for [petitioner] to relitigate that claim a second time through the state courts in order to preserve it for our consideration on review of the final judgment rendered in the cause"]; *Reece v. Georgia*, 350 U.S. 85, 87 [1955]).

Thus, contrary to Respondent's contention in opposition, the fact that an issue decided upon an earlier appeal would be the law of the case (or, as Respondent posits, the related doctrine of *res judicata*) on a later appeal does not constitute an independent and adequate state ground for the state court ruling. Rather, that fact itself furnishes the very reason for allowing review of earlier interlocutory rulings upon the appeal from the final judgment; otherwise, review in this Court would be evaded. The fact that the interlocutory appeal in this case was accomplished by way of a separate proceeding which, concededly, resulted in a final judgment for purposes of this Court's jurisdiction, should not change that result where, as here, that prior final judgment was nevertheless not fit for *certiorari* review. *See Rescue Army, supra*, 331 U.S. 549.

In cases arising out of state courts, the "not pressed

or passed upon" rule is justified by both the general "reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented" and the "due regard for the appropriate relationship of this Court to state courts." *Gates, supra*, 462 U.S. at 220. In *Cardinale v. Louisiana* (394 U.S. 437, 439 [1969]), this Court summarized these policies:

> Questions not raised below are those on which the record is very likely to be inadequate ... And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds ... they should be given the first opportunity to consider them.

None of these policies applies where, as here, the precise issue sought to be reviewed was actually presented to the state court in a related proceeding involving the same parties. The Court of Appeals was given every opportunity to decide the issue presented here, and thus clearly "due regard" has been given to the principles of Federalism articulated in *Gates* and *Cardinale*. Moreover, the record here is more than adequate to review the Constitutional issue, and the further proceedings on this direct appeal have, if anything, further developed and refined the precise nature and scope of the Constitutional claim. These further proceedings have also made it even clearer that the Court of Appeals invalidated Respondent's death sentence solely on the basis of Federal law, rather than any independent and adequate state ground. In *Relin*, the Court of Appeals repeatedly stated that it was "compel[led]" by *Jackson* to invalidate the plea provisions of the statute as violative of the Fifth and Sixth Amendments to the U.S. Constitution. 92 NY2d at 620, 626, 629. The effect of that decision on

Respondent's death sentence, however, was at that point hypothetical. The further proceedings on this direct appeal made it clear that there was no independent or adequate state law ground of decision; the Court of Appeals was still of the opinion that "[e]xactly the situation Jackson held untenable ... occurred here ... defendant's Fifth and Sixth Amendment trial rights were burdened and he was tried under an unconstitutional two-tiered penalty scheme. The sentence of death therefore must be set aside." *People v. Mateo*, ___ N.Y.3d ___, A. 10-11).

In short, the policies underlying the "pressed or passed upon" rule have been fully satisfied, and indeed supplemented, by the dual proceedings here. The policies underlying the finality rule, and fundamental concepts of justiciability, on the other hand, were not satisfied by the Court of Appeals' decision in *Relin*; it is only with the verdict and sentence in this case that this Court has been presented with a fully justiciable controversy presenting the issues properly preserved in these dual proceedings.

The basic concept behind the finality requirement is that a state court judgment "'must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.'" *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). The rule is "reflective of some of the Court's ... basic principles of constitutional adjudication, i.e., that the Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it,' and that the Court should not 'decide questions of a constitutional nature unless absolutely necessary to a decision of the case.'" *Supreme Court Practice, supra,* at 141, *quoting Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346-347 (1936) (Brandeis, J., concurring).

Relin was initiated as a direct result of the trial court's decision in this very case that certain provisions of the New York death penalty statute were unconstitutional under *Jackson* - again, the very issue presented here.

However, *Relin* was far from an "effective determination" of this litigation. While the *Relin* decision ultimately upheld the trial court's ruling and invalidated the plea provisions of the death penalty on *Jackson* grounds, it did not invalidate the death sentence in this case. Indeed, at the point that the *Relin* case was presented to the Court of Appeals, the effect that any determination would have on Respondent was completely theoretical, as he had not yet been sentenced. Accordingly, the Petition for Certiorari in *Relin* presented an abstract, hypothetical constitutional claim, the effect of which on this litigation was uncertain. Whether the Court of Appeals would thereafter uphold Respondent's death sentence, based on its saving construction of the statute in *Relin*, or invalidate it on *Jackson* grounds was still to be decided. In this respect, the *Relin* case was similar to *California v. Rooney, supra*, 483 U.S. 307. As *Relin* stood, this Court had "no way of knowing what the [New York Court of Appeals'] position on the issue of" the imposition of the death penalty would ultimately be. *Id.*, at 313. It was only with the final decision in this case that the issue became ripe for review.

Concededly, this Court has held that an action such as *Relin* terminates in a final judgment, even where there is a related criminal proceeding pending. *See Bandini Petroleum Co. v. Superior Court*, 284 U.S. 8 (1931); *Plessy v. Ferguson*, 163 U.S. 537 (1896). However, this Court has also recognized that, even though the judgment in such a case is final, it may nevertheless not be properly reviewable. *See Rescue Army, supra*, 331 U.S. 549. Where that is the case issues presented in earlier proceedings not properly reviewable are deemed preserved for review on the final judgment in later related proceedings. *Id.*, at 584; *see generally Supreme Court Practice, supra*, at 154.

The *Rescue Army* case involved, on the merits, "substantial [Consitutional] questions" (331 U.S. at 551); nevertheless, because of the procedural posture of the case, which mirrored the procedural posture presented in *Relin*, this Court held that it was not proper to decide those

questions *at that juncture*. *Rescue Harbor* was a prohibition proceeding. This Court initially concluded that the judgment was final, despite the fact that the underlying criminal prosecution survived, and thus the Court had jurisdiction. *Id.*, at 568. However, based on longstanding Article III concerns of not deciding Constitutional questions unless they are "unavoidable" (*id.*, at 570, n. 34), this Court nevertheless determined that there were "compelling reasons ... for not exercising" that jurisdiction. *Id.*, at 569. Those "compelling reasons" were equally applicable to the *Relin* petition.

As in *Rescue Harbor*, the effect of the *Relin* decision on Respondent was, at best, hypothetical at the time the decision was rendered, and completely abstract at the point it was presented to the Court of Appeals for consideration. *Relin* simply did not address, much less pass upon, the Constitutional validity of Respondent's death sentence. It was not until the direct appeal in this case that that issue became anything more than "abstract" and "hypothetical." Indeed, the *Rescue Army* Court cautioned specifically against taking jurisdiction over declaratory judgment actions, such as *Relin*, because they present issues "in highly abstract or premature, if not hypothetical states of fact." *Id.*, at 572, n. 40. Accordingly, while *Relin* was final for purposes of this Court's jurisdiction, it nevertheless would have been an improvident exercise of this Court's jurisdiction to take the case in the procedural posture presented at that time. *Id.*, at 574-576.

More crucial to the issue of reviewability here is that, after concluding that the judgment on the writ of prohibition was final, though not appropriately reviewable, this Court went on to say that its dismissal of the prohibition appeal "should be without prejudice to any rights which may arise upon final determination of the Municipal Court proceeding, relative to review in this Court of that determination." *Id.*, at 584. Thus, just as with interlocutory rulings, this Court held that the issues raised in the prohibition proceeding would be reviewable in the

appeal from the final judgment in the related, underlying criminal proceeding, ***even though the prior judgment, on its face, was final***. This case precisely mirrors the procedural posture contemplated in the *Rescue Army* case, and the same result should hold.

C. This Court has jurisdiction even if the issue was not strictly "pressed or passed upon" below.

Finally, even assuming, *arguendo*, that this Court were to hold that the "pressed or passed on" rule was not technically satisfied here, this case presents the quintessential opportunity for this Court to address the question, explicitly left unanswered in *Illinois v. Gates*, of whether that rule is jurisdictional or merely prudential. This Court refused to resolve the issue in *Gates* because it concluded that, even assuming the rule is prudential, the prudential concerns were not satisfied in that case. 462 U.S., at 221-222. Here, by contrast, as set forth above, the prudential reasons for the "pressed or passed upon" rule have been fully satisfied. The record in this case is more than adequate to decide the issue, and the state court has rested its decision firmly on Constitutional grounds. Finally, there is no concern here with stepping on "the appropriate relationship of this Court to" the Court of Appeals, inasmuch as that court not only had every opportunity to decide the issue, but, in doing so, affirmatively invited this Court to reexamine *Jackson*. If anything, the "appropriate relationship" between the courts militates in favor of this Court accepting that invitation.

CONCLUSION

This Court has jurisdiction.

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IN THE

Supreme Court of the United States

THE STATE OF NEW YORK,

Petitioner,

vs.

ANGEL L. MATEO,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a federal constitutional question presented in a state criminal case is decided in a technically separate pretrial proceeding and not reconsidered by the state appellate courts on appeal from the final criminal judgment, does this Court have jurisdiction to review the question on that appeal?

2. Does a state statute which forbids a guilty plea to capital murder, but makes an exception when the defendant, the prosecutor, and the court all agree on the plea and to a sentence less than death, violate the rule of *United States* v. *Jackson*, 390 U. S. 570 (1968)?

3. If so, should *Jackson* be overruled or declared inapplicable to post-*Furman* statutes?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION OF WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, the highest court of a state felt compelled to declare the state's death penalty law unconstitutional in part and overturn well-deserved sentences of multiple murderers, based on an ill-considered summary disposition by this Court 33 years

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

ago. Further, a dubious precedent of this Court casts a shadow over efforts to reform plea-bargaining. These results are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS, STATUTES, AND CASE

On November 2, 1996, Angel Mateo kidnapped and murdered Juan Rodriguez-Matos, a mentally impaired young man whom Mateo thought might have information on the whereabouts of Mateo's estranged girlfriend. This murder was part of a month-long spree of crimes. Pet. for Cert. 3-4.

In New York's capital punishment law, the constitutionally required narrowing of the death-eligible class is built into the definition of first-degree murder. See N. Y. Penal Law § 125.27(1)(a)[2]; see also *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988) (holding that this is a constitutionally permitted method of narrowing). Murder in the course of a kidnapping is one of the circumstances that will raise an intentional murder to first degree, and hence make the defendant eligible for the death penalty. N. Y. Penal Law § 125.27(1)(a)(vii). If the prosecutor has given notice of intent to seek the death penalty, see N. Y. Crim. Proc. Law ("CPL") § 250.40, the jury determines the penalty by weighing the aggravating and mitigating factors. CPL § 400.27(11)(a). The aggravating factors are the eligibility factors from the guilt phase plus certain prior convictions. CPL § 400.27(3), (7).

The New York Constitution forbids jury waivers in capital cases. N.Y. Const., Art. I, § 2. By statute, murder defendants are forbidden to plead guilty to first-degree murder except with the consent of both the court and the prosecution and with a stipulated sentence less than death. CPL §§ 220.10(5)(e), 220.30(3)(b)(vii).

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2. The pertinent New York statutes are printed in the Appendix to this brief.

Mateo was indicted for first-degree murder. The trial court held that the plea statutes were unconstitutional under *United States* v. *Jackson*, 390 U. S. 570 (1968) because of the exception clause. The district attorney sought a writ of prohibition. See *Matter of Relin* v. *Connell*, 251 App. Div. 2d 1041, 674 N. Y. S. 2d 192 (1998).[3] The Appellate Division denied the writ but converted the proceeding into a declaratory judgment action and declared that the statute was constitutional. *Ibid.* The New York Court of Appeals consolidated its review of this decision with a similar case from another division and reversed. It held that the plea provisions were invalid but severable. "Under the resulting statute, a defendant may not plead guilty to first degree murder while a notice of intent to seek the death penalty is pending." *Matter of Hynes* v. *Tomei*, 92 N. Y. 2d 613, 629, 706 N. E. 2d 1201, 1208-1209 (1998).

The trial was not stayed during these proceedings. Mateo was convicted on December 3, 1998, and sentenced to death on December 16, 1998, six days before the Court of Appeals' decision. *People* v. *Mateo*, App. to Pet. for Cert. 9-10. Mateo appealed directly to the Court of Appeals. See *id.*, at 1. Given its prior decision in *Hynes*, the Court of Appeals determined that reversal of the death sentence was required by the hypothetical possibility that the defendant might have sought to avoid the death penalty by pleading guilty. *Id.*, at 10. The fact that both parties had unequivocally rejected the sentence bargain that was a statutory prerequisite to such a plea, see Pet. for Cert. 5-6, was not mentioned.

SUMMARY OF ARGUMENT

Respondent has raised a question regarding this Court's jurisdiction that is important and unresolved, and only this Court can resolve it. He claims that whenever this Court *has*

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3. Relin was the district attorney, and Connell was the trial judge. Mateo was an additional respondent.

jurisdiction to review an issue decided before a criminal trial in a nominally separate action, it necessarily *lacks* jurisdiction to review that issue on appeal from the final criminal judgment. That conclusion does not follow, but the unsettled state of the law on this point causes continuing problems for both the Court and counsel.

The state court in the present case rejected an argument that *United States* v. *Jackson* was distinguishable based on an unexplained summary disposition by this Court 33 years ago in *Atkinson* v. *North Carolina*. That summary disposition was ill-considered, because it did not meet this Court's criteria for summary disposition. Even so, it was binding on the state court. This is not a case where a state court has simply erred on a federal question. It is a case where that error was mandated by an old, improvident action of this Court which has never been corrected.

The continuing effect of *Jackson* is much broader than its prohibition of one particular, rare type of statute. The broad language of that opinion and the lack of resolution with the seemingly contrary results of later cases cast a shadow of uncertainty over attempts to control pleas and plea-bargaining in order to achieve more uniform and even-handed justice.

ARGUMENT

I. The jurisdictional objection raised by petitioner is, by itself, worthy of this Court's review.

Respondent Mateo claims that this Court lacks jurisdiction to review the question presented at this stage of the proceedings and that the question was only reviewable in this Court at an earlier stage. See Respondent's Brief in Opposition ("Opp.") 8-9. *Amicus* CJLF submits that the jurisdictional question raised by Respondent is an important one, unresolved to date, which can only be resolved by this Court. The jurisdictional question, by itself, is worthy of this Court's review.

Respondent contends that the decision of the New York Court of Appeals at the previous stage of this litigation was a final judgment for the purpose of defining this Court's jurisdiction to review the issue at that time, and therefore this Court does not have jurisdiction to review it now. See *ibid.* The premise of this argument is doubtful. Much more importantly, though, the conclusion does not follow.

In the previous stage of this case, the Appellate Division decided a federal constitutional question in a proceeding that was technically a separate, original action but was in substance a review of a ruling of the trial judge in the criminal case. That decision was then reviewed by the Court of Appeals. This mode of proceeding is neither novel nor unusual, and this Court has a long history of looking past the form and considering the substance when determining its own jurisdiction.

Nearly two centuries ago, a defendant in a pending federal prosecution for treason petitioned this Court for an original writ of habeas corpus. See *Ex parte Bollman*, 4 Cranch (8 U. S.) 75 (1807). Under the then-recent decision of *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137 (1803), this Court had no jurisdiction to issue an original writ to an executive officer. Despite the case being original in form, the *Bollman* Court decided it was appellate in reality, revising the decision of the committing court. 4 Cranch, at 100-101.

Similarly, *Matter of Hynes* v. *Tomei*, 92 N. Y. 2d 613, 705 N. E. 2d 1201 (1998) was a separate proceeding in form, but in reality it was an interlocutory appeal of rulings in the underlying criminal cases, one of which was Mateo's. Respondent cites *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 553-555 (1947) for the proposition that this "separate proceeding" form, and only the form, gave this Court jurisdiction to review the issue at that stage. See Opp. 8. *Rescue Army* does not go that far.

In *Rescue Army*, defendants facing trial in a criminal case petitioned the state appellate court for a writ of prohibition,

contending the trial court had no jurisdiction because the ordinance was unconstitutional. 331 U. S., at 550, 552. A ruling in the petitioners' favor, finding the statutes unconstitutional, would have ended the criminal action. See *id.*, at 567-568. Similarly, in the other case cited by Respondent, *New York ex rel. Bryant* v. *Zimmerman*, 278 U. S. 63 (1928), pretrial habeas corpus was used for the same purpose. See *Rescue Army*, *supra*, at 566-568. Both of these cases fall into the fourth category of *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 482-483 (1975), "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of . . . the state proceedings still to come." This is because of the effect, not the form, of the judgment at issue. This is how the Court has understood *Rescue Army* in the years since it was decided. "A judgment that terminates original proceedings in a state appellate court, *in which the only issue decided concerns the jurisdiction of a lower state court*, is final, even if further proceedings are to be had in the lower court." *Fisher* v. *District Court of Sixteenth Judicial Dist. of Mont.*, 424 U. S. 382, 385, n. 7 (1976) (emphasis added). If *Rescue Army* stood for as broad a proposition as Respondent contends, the italicized clause in this passage would not be there.

The "final judgment" status of *Hynes* was a more difficult question than Respondent would have the Court believe. Indeed, as the Court has noted more than once, these questions are frequently difficult. See, *e.g.*, *Cox Broadcasting*, 420 U. S., at 478, n. 7. That is why the second step of Respondent's argument presents the much more important question. If this Court *does* have jurisdiction to review a judgment which is a separate proceeding in form but an interlocutory appeal in practice, does it follow that the Court does *not* have jurisdiction to review the same question on appeal from the final judgment in the underlying action?

Rescue Army strongly implies that the answer is no. At the time of that decision, cases challenging the constitutionality of statutes came under this Court's mandatory appeal jurisdiction and not the discretionary certiorari jurisdiction. See B. Boskey & E. Gressman, The Supreme Court Bids Farewell to Mandatory Appeals, 109 S. Ct. *109*, *123* (1988). Even so, the *Rescue Army* Court declined to decide the merits for prudential reasons. 331 U. S., at 584-585. "Our decision of course should be without prejudice to any rights which may arise upon final determination of the Municipal Court proceeding, *relative to review in this Court of that determination.*" *Id.*, at 584 (emphasis added). In other words, the *Rescue Army* Court held that it had the power to decide the constitutionality of the ordinances at the preliminary stage, but it declined to do so and stated that it could review them after final judgment in the underlying criminal action.

Respondent cites R. Stern, E. Gressman, S. Shapiro, and K. Geller, Supreme Court Practice 159, 161 (9th ed. 2002) ("Stern") to support the proposition that this Court did have jurisdiction to review *Hynes*. Opp. 9. Fair enough. But a few pages earlier in the same treatise, these authors state that the jurisdiction of this Court to review the same issue in the second round is an important but unresolved question:

> "The dilemma posed in such situations is one of the unintended consequences of ascribing finality to the first of two rulings by the highest state court. It is one thing to hold that a litigant may seek early review of a state court decision because otherwise the federal constitutional issue might disappear or be eroded. But it is quite a different matter to hold that a litigant is precluded from review if, having carefully preserved his constitutional claims on the remand, he waits for the end of the state court litigation before bringing his federal claims to the Supreme Court. Finality is too practical a doctrine to be turned into such a trap for litigants and such an erosion of the Court's jurisdiction to pass on substantial federal claims in state court

cases. Nothing in the Court's decision in *Cox*, or related cases, suggests that this result is mandated by the finality doctrine, as now interpreted.

> "Nevertheless, the Supreme Court has not yet supplied a definitive answer to this question . . . . [P]ending some definite ruling on the matter, it is best to seek review of the first judgment whenever its finality is a reasonable possibility, and, if unsuccessful, to bring up the second judgment later." *Stern*, *supra*, at 156.

The last sentence of this passage is sound advice for the practitioner, but it generates unnecessary expense for the parties and creates an institutional problem for this Court. In this situation, two certiorari petitions are required where there should be only one.

A regime of mutually exclusive jurisdiction—first stage or second stage but not both—creates an additional problem for the Court. As noted earlier, the finality of a state court judgment at the first stage is often a close and difficult question. But the process of sorting through the thousands of certiorari petitions this Court receives each term, see *id.*, at 58, does not lend itself to deciding close and difficult questions at this stage. Where the substantive question is "certworthy" but the finality question is borderline, it would be better in most cases to deny certiorari on the first round and take up the issue when it comes back on an indisputably final judgment.

Respondent says that the New York courts could not revisit the issue in the second round because the decision in the first round was res judicata. Opp. 9. It is well settled that the refusal of state courts to reconsider an issue under the law-of-the-case doctrine does not preclude this Court's review. See, *e.g.*, *Hathorn* v. *Lovorn*, 457 U. S. 255, 261-262 (1982); *Reece* v. *Georgia*, 350 U. S. 85, 87 (1955). Does this Court's jurisdiction depend upon whether state practice gives a pretrial writ decision res judicata effect as opposed to law-of-the-case effect? That would require this Court to be familiar with the

practices of all 50 states in this regard, keep that information current, and apply it when deciding whether to grant certiorari in pretrial matters.[4]

Two simple rules would provide the clearest guidance for counsel and place the least burden on the Court. First, a decision which contemplates further proceedings in the state courts is a final judgment reviewable in this Court if and only if it fits within one of the four *Cox Broadcasting* categories, regardless of the form of the proceeding. Second, this Court always has jurisdiction to review federal questions on which the judgment rests, if properly presented to the state court, regardless of the stage of the litigation in which the question was decided.

The "properly presented" aspect of the second rule requires a brief mention here. In *Osborne* v. *Ohio*, 495 U. S. 103, 123-124 (1990), the defendant made his federal claims in a pretrial motion and received a definite ruling from the trial judge. The fact that he did not make a pointless and repetitive objection on the same ground when the jury was instructed did not bar this Court's review. "Were we to accept this position, we would force resort to an arid ritual of meaningless form, . . . and would further no perceivable state interest." *Id.*, at 124 (internal quotation marks omitted; ellipsis in original). So it is in this case. A party must, of course, fairly present his claim to the highest state court with jurisdiction to hear it, see *e.g.*, *Baldwin* v. *Reese*, 541 U. S. __ (No. 02-964, Mar. 2, 2004) (slip op., at 1), but repetitive submission to the same court is not required in habeas corpus, see *O'Sullivan* v. *Boerckel*, 526 U. S. 838, 844 (1999), and it ought not be required on direct review. In the present case, it makes no difference whether the People renewed their *Hynes* argument to the Court of Appeals on

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4. Regrettably, counsel cannot always be depended on to fully brief jurisdictional issues. See, *e.g.*, *Florida* v. *Thomas*, 532 U. S. 774, 777 (2001); *Johnson* v. *California*, 541 U. S. __ (No. 03-6539, May 3, 2004) (slip op., at 4) (*per curiam*).

appeal from the final judgment. Just as in *Osborne*, they had made the argument, received the ruling, and preserved the issue for this Court's review.

The jurisdictional question in this case is, by itself, a "compelling reason[ ]" to grant a writ of certiorari, see Supreme Court Rule 10, postponing the jurisdictional question until the case is fully briefed and argued.

II. The state court's decision in this case was constrained by an ill-considered summary reversal issued 33 years ago, but which is still binding precedent.

When criminal defendants cite *United States* v. *Jackson*, 390 U. S. 570 (1968) most courts recognize that *Jackson* was limited by later decisions and decline to extend it beyond its facts. See, *e.g.*, *Parish* v. *Fulcomer*, 150 F. 3d 326, 328 (CA3 1998). In an earlier stage of the present case, however, the New York Court of Appeals extended *Jackson* well beyond its facts, based on the unexplained summary disposition by this Court in *Atkinson* v. *North Carolina*, 403 U. S. 948 (1971). See *Matter of Hynes* v. *Tomei*, 92 N. Y. 2d 613, 624, 706 N. E. 2d 1201, 1205 (1998). This remarkable extension of a precedent which has been universally understood to be limited demonstrates that the scope of *Jackson* requires further definition, and, in particular, that *Atkinson* must be reconsidered.

Jackson dealt with a seemingly straightforward federal kidnapping statute that provided for the death penalty when the victim was harmed "and if the jury shall so recommend . . . ." 390 U. S., at 571 (quoting 18 U. S. C. § 1201(a)). The defendant's contention was that the statute prohibited the death penalty in any case where there was no guilt-phase jury, thereby penalizing the defendant who elects to contest his guilt before a jury. See *id.*, at 571-572.

The Government suggested several ways this result could be avoided. One was that a jury could be convened for the

penalty phase only. The Court held that such a procedure was not legally authorized. See *id.*, at 576-577.[5] Another suggestion, particularly important to the present case, was that the Court exercise its supervisory power to forbid acceptance of guilty pleas and jury waivers in kidnapping cases subject to the death penalty. *Id.*, at 584. The Court did not dispute that, under this proposal, "no defendant tried under the federal statute would be induced to forego a constitutional right." *Ibid.* However, the Court said, such a requirement must come from the legislative branch and not the judiciary. See *id.*, at 585.

Reading *Jackson*, it is striking how far the Court bent over backwards to invalidate the death penalty portion of this statute. The notion that Congress really intended to empower kidnappers to unilaterally preclude the death penalty by pleading guilty is preposterous on its face. In other contexts, the Court has had no difficulty creating new procedures when necessary to meet constitutional requirements. See, *e.g.*, *Miranda* v. *Arizona*, 384 U. S. 436 (1966); *Boykin* v. *Alabama*, 395 U. S. 238 (1969); *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). One cannot help but suspect that the *Jackson* Court's real problem with this statute was that it imposed the death penalty for a crime less than murder. Cf. *Coker* v. *Georgia*, 433 U. S. 584 (1977). Perhaps the Court's contrived procedural conundrum was a device for avoiding that result when it was not yet prepared to impose the substantive prohibition later adopted in *Coker*. Another possibility is that it was simply part of the run-up to *Furman* v. *Georgia*, 408 U. S. 238 (1972). See Hoffman, Kahn, & Fisher, Plea Bargaining in the Shadow of Death, 69 Fordham L. Rev. 2313, 2374-2375 (2001).

Whatever the motivation for the decision, *Jackson*'s "impermissible burden" rationale, see 390 U. S., at 572, was not carried to its logical limit. In *Bordenkircher* v. *Hayes*, 434 U. S. 357 (1978), the defendant faced a choice similar to that

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5. It is now. See 18 U. S. C. § 3593(b)(2)(A).

faced by Jackson. He could plead guilty to charges punishable by 2 to 10 years, or he could go to trial facing a possible life sentence. See *id.*, at 358-359; see also *id.*, at 372 (Powell, J., dissenting) (citing *Jackson*). Even so, the Court held that the prosecutor could legitimately "present[] the defendant with [these] unpleasant alternatives . . . ." *Id.*, at 365.

Unlike the statute in *Jackson*, the statute in the present case does not authorize the defendant to unilaterally remove the possibility of the death penalty by pleading guilty. Instead, the statute does what the *Jackson* Court declined to do judicially and said could only be done legislatively. That is, it forbids guilty pleas so long as capital punishment remains a possible sentence. See *Hynes*, 92 N. Y. 2d, at 622, 706 N. E. 2d, at 1204-1205, cf. *Jackson*, 390 U. S., at 585. The New York statute requires the consent of the prosecutor, the approval of the court, and a stipulated sentence less than death before a guilty plea to the highest degree of murder can be accepted. In other words, it requires a plea bargain.

These kinds of plea bargains are struck all the time. See, *e.g.*, *Edwards* v. *Carpenter*, 529 U. S. 446, 448 (2000). Their validity is no longer subject to serious constitutional question. The only thing the New York statute forbids is pleading guilty *without* such a bargain.

North Carolina had a similar statute until 1969. See *Parker* v. *North Carolina*, 397 U. S. 790, 792-793, n. 2 (1970). In *State* v. *Peele*, 274 N. C. 106, 111, 161 S. E. 2d 568, 572 (1968), decided two months after *Jackson*, the North Carolina Supreme Court considered *Jackson* and found the state statute to be distinguishable on precisely these grounds. In *State* v. *Atkinson*, 275 N. C. 288, 316, 167 S. E. 2d 241, 258 (1969), the same court rejected a *Jackson* claim, relying on its prior decision in *Peele*. The *Parker* Court evidently considered it an open question whether the statute violated *Jackson*. "It *may* be that under . . . *Jackson* . . . it was unconstitutional to impose the death penalty under the statutory framework which existed in

North Carolina at the time of Parker's plea." 397 U. S., at 794-795 (emphasis added).

Yet despite language in *Jackson* supporting the distinction and despite *Parker*'s implication that the question was open, this Court summarily reversed in *Atkinson*. The order gave no explanation except a citation to *Jackson* and another federal case in which *Jackson* error was conceded. *Atkinson* v. *North Carolina*, 403 U. S. 948 (1971). This summary action was entirely uncalled for. Summary reversal is appropriate only when it "does not decide any new or unanswered question of law, but simply corrects a lower court's demonstrably erroneous application of federal law." *Maryland* v. *Dyson*, 527 U. S. 465, 467, n.* (1999) (*per curiam*). In *Atkinson*, the North Carolina Supreme Court decided a question that *Jackson* had unambiguously left unanswered. Reversal of such a considered, reasonable decision warrants at least a *per curiam* opinion, if not full briefing and argument.

The New York Court of Appeals held it was bound by *Atkinson* and its companion cases. See *Hynes*, 92 N. Y. 2d, at 623-624, 706 N. E. 2d, at 1205-1206. When, and if, an issue decided summarily by this Court returns *here* for decision, it is well established that the previous summary disposition does not carry the same precedential weight as a full opinion. See *Edelman* v. *Jordan*, 415 U. S. 651, 671 (1974). That is not true in any other court in the nation, however. "[T]he lower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not." *Hicks* v. *Miranda*, 422 U. S. 332, 344-345 (1975) (brackets and inner quotation marks omitted); see also *Hunter* v. *Bryant*, 502 U. S. 224, 235 (1991) (*per curiam*) (Kennedy, J., dissenting).

It is one thing to say that an error by a state court that does not affect other states is not worthy of this Court's review. It is quite another to say that this Court should turn its back on a miscarriage of justice caused by its own improvident action of 33 years ago, summarily reversing a decision that was certainly debatable among reasonable minds, and quite possibly correct.

The issue presented by this case has never been decided by this Court in a written opinion, and it was not decided in the state courts in an unfettered opinion, free of the dubious restraint of *Atkinson*. The People of the State of New York have been permanently denied justice in this matter, on an issue which has never been properly considered.

III. *Jackson*'s uncertain scope continues to cause damage to this day, inhibiting reforms with a shadow of constitutional doubt.

Respondent maintains that reconsideration of *United States* v. *Jackson*, 390 U. S. 570 (1968) is not necessary because of "national conformity with *Jackson* . . . ." Opp. 9. This argument fails to appreciate the continuing damage caused by bogus constitutional restrictions. The people of the several States have the constitutional right to decide for themselves, through the democratic process, all of the issues that are neither decided directly by the Constitution nor assigned by the Constitution to the federal government. U. S. Const., Amdt. 10. When a precedent erroneously removes an issue from democratic control, that precedent violates this right every day it remains in effect. See *Elk Grove Unified School District* v. *Newdow*, 542 U. S. __ (No. 02-1624, June 14, 2004) (slip op., at 16) (Rehnquist, C. J., concurring in the judgment).

When a legislative body considers a possible improvement in criminal procedure, the possibility that a court might declare it unconstitutional places a heavy weight on the anti-reform side of the scale. The invalidation of a practice in widespread use is a disaster. Under *Griffith* v. *Kentucky*, 479 U. S. 314, 322-323 (1987) full retroactivity on direct appeal is a price that has to be paid for the integrity of judicial rule-making. Perhaps so, but it is an extremely heavy price nonetheless. States cannot afford to be the laboratories of innovation that our federal system envisions, see *Arizona* v. *Evans*, 514 U. S. 1, 8 (1995),

when the price of guessing wrong is the invalidation of judgments by the thousands.

One example of this inhibitory effect will illustrate the point. Plea bargaining is justified as a practical necessity, see *Blackledge* v. *Allison*, 431 U. S. 63, 71 (1977). However, the practice remains controversial, and there are good reasons to abolish it if abolition can be made practical. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 21.1(e)-(g), pp. 12-23 (2d ed. 1999). When widely varying punishments are meted out for the same conduct based on bargaining between individual prosecutors and defense attorneys, the potential for arbitrary, unequal dispensation of justice and mercy is obvious. One possible solution would be to substitute jury waivers for guilty pleas with a system giving concessions on the sentence for those defendants willing to waive jury trial.[6] See *id.*, at 22-23. "But for this to be a viable alternative, it must appear . . . that the Sixth Amendment right to jury trial is not absolute and thus may be lawfully discouraged by such tendering of concessions for its surrender." *Id.*, at 23. The uncertain scope of *Jackson* looms ominously over this proposal. A legislature would be foolish to try it when the possibility exists of a catastrophic invalidation of every criminal judgment in the state. See, *e.g.*, *People* v. *Collins*, 26 Cal. 4th 297, 306, 309, 27 P. 3d 726, 732-733 (2001) (holding, based in part on *Jackson*, that the trial court cannot offer an incentive for jury waiver, even though the prosecutor can).

Jackson is not, by its terms, limited to its specific facts. It is written in sweeping language. To date there has been no coherent explanation of why later cases that seem to come within its language were decided differently. See 5 LaFave, *supra*, at 34-35. Until that explanation is given, or until

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6. Ideally, arbitrariness would be minimized with a statute providing a uniform "discount" for all defendants who waive jury trial.

Jackson is simply overruled,[7] the constitutional status of attempts to bring greater uniformity to the granting of incentives for pleas or waivers will remain in doubt. While that status is in doubt, innovation is stifled.

CONCLUSION

The petition for writ of certiorari should be granted.

June, 2004

Respectfully submitted,

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Criminal Justice Legal Foundation

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7. The result in *Jackson* need not be overruled. A statutory system that empowered any defendant, no matter how heinous his crime, to *unilaterally* preclude the death penalty by pleading guilty would be arbitrary in violation of *Furman* v. *Georgia*, 408 U. S. 238 (1972).

APPENDIX A

New York Penal Law

§ 125.27 Murder in the first degree.

A person is guilty of murder in the first degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person; and

(a) Either:

(i) the intended victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was a police officer; or

(ii) the intended victim was a peace officer as defined in paragraph a of subdivision twenty-one, subdivision twenty-three, twenty-four or sixty-two (employees of the division for youth) of section 2.10 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was such a uniformed court officer, parole officer, probation officer, or employee of the division for youth; or

(iii) the intended victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was an employee of a state correctional institution or a local correctional facility; or

(iv) at the time of the commission of the killing, the defendant was confined in a state correctional institution or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the

minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the killing, the defendant had escaped from such confinement or custody while serving such a sentence and had not yet been returned to such confinement or custody; or

(v) the intended victim was a witness to a crime committed on a prior occasion and the death was caused for the purpose of preventing the intended victim`s testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced, or the intended victim had previously testified in a criminal action or proceeding and the killing was committed for the purpose of exacting retribution for such prior testimony, or the intended victim was an immediate family member of a witness to a crime committed on a prior occasion and the killing was committed for the purpose of preventing or influencing the testimony of such witness, or the intended victim was an immediate family member of a witness who had previously testified in a criminal action or proceeding and the killing was committed for the purpose of exacting retribution upon such witness for such prior testimony. As used in this subparagraph "immediate family member" means a husband, wife, father, mother, daughter, son, brother, sister, stepparent, grandparent, stepchild or grandchild; or

(vi) the defendant committed the killing or procured commission of the killing pursuant to an agreement with a person other than the intended victim to commit the same for the receipt, or in expectation of the receipt, of anything of pecuniary value from a party to the agreement or from a person other than the intended victim acting at the direction of a party to such agreement; or

(vii) the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary in the first degree or second

degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree; provided however, the victim is not a participant in one of the aforementioned crimes and, provided further that, unless the defendant`s criminal liability under this subparagraph is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter, this subparagraph shall not apply where the defendant`s criminal liability is based upon the conduct of another pursuant to section 20.00 of this chapter; or

(viii) as part of the same criminal transaction, the defendant, with intent to cause serious physical injury to or the death of an additional person or persons, causes the death of an additional person or persons; provided, however, the victim is not a participant in the criminal transaction; or

(ix) prior to committing the killing, the defendant had been convicted of murder as defined in this section or section 125.25 of this article, or had been convicted in another jurisdiction of an offense which, if committed in this state, would constitute a violation of either of such sections; or

(x) the defendant acted in an especially cruel and wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim`s death. As used in this subparagraph, "torture" means the intentional and depraved infliction of extreme physical pain; "depraved" means the defendant relished the infliction of extreme physical pain upon the victim evidenc-

ing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain; or

(xi) the defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-four months when committed in a similar fashion or pursuant to a common scheme or plan; or

(xii) the intended victim was a judge as defined in subdivision twenty-three of section 1.20 of the criminal procedure law and the defendant killed such victim because such victim was, at the time of the killing, a judge; or

(xiii) the victim was killed in furtherance of an act of terrorism, as defined in paragraph (b) of subdivision one of section 490.05 of this chapter; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

2. In any prosecution under subdivision one, it is an affirmative defense that:

(a) The defendant acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant`s situation under the circumstances as the defendant believed them to be. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime except murder in the second degree; or

(b) The defendant`s conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this paragraph shall constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the second degree or any other crime

except murder in the second degree. Murder in the first degree is a class A-I felony.

New York Criminal Procedure Law

§ 220.10 Plea; kinds of pleas.

The only kinds of pleas which may be entered to an indictment are those specified in this section:

1. The defendant may as a matter of right enter a plea of "not guilty" to the indictment.

2. Except as provided in subdivision five, the defendant may as a matter of right enter a plea of "guilty" to the entire indictment.

* * *

5. (e) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

* * *

New York Criminal Procedure Law

§ 220.30 Plea; plea of guilty to part of indictment; plea covering other indictments.

* * *

3. (b) (vii) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law; provided, however, that a defen-

dant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

* * *

New York Criminal Procedure Law

§ 250.40 Notice of intent to seek death penalty.

1. A sentence of death may not be imposed upon a defendant convicted of murder in the first degree unless, pursuant to subdivision two of this section, the people file with the court and serve upon the defendant a notice of intent to seek the death penalty.

2. In any prosecution in which the people seek a sentence of death, the people shall, within one hundred twenty days of the defendant`s arraignment upon an indictment charging the defendant with murder in the first degree, serve upon the defendant and file with the court in which the indictment is pending a written notice of intention to seek the death penalty. For good cause shown the court may extend the period for service and filing of the notice.

3. Notwithstanding any other provisions of law, where the people file a notice of intent to seek the death penalty pursuant to this section the defendant shall be entitled to an additional sixty days for the purpose of filing new motions or supplementing pending motions.

4. A notice of intent to seek the death penalty may be withdrawn at any time by a written notice of withdrawal filed with the court and served upon the defendant. Once withdrawn the notice of intent to seek the death penalty may not be refiled.

New York Criminal Procedure Law

§ 400.27 Procedure for determining sentence upon conviction for the offense of murder in the first degree.

1. Upon the conviction of a defendant for the offense of murder in the first degree as defined by section 125.27 of the penal law, the court shall promptly conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or to life imprisonment without parole pursuant to subdivision five of section 70.00 of the penal law. Nothing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case, in which case the separate sentencing proceeding shall not be conducted and the court may sentence such defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

* * *

3. For the purposes of a proceeding under this section each subparagraph of paragraph (a) of subdivision one of section 125.27 of the penal law shall be deemed to define an aggravating factor. Except as provided in subdivision seven of this section, at a sentencing proceeding pursuant to this section the only aggravating factors that the jury may consider are those proven beyond a reasonable doubt at trial, and no other aggravating factors may be considered. Whether a sentencing proceeding is conducted before the jury that found the defendant guilty or before another jury, the aggravating factor or factors proved at trial shall be deemed established beyond a reasonable doubt at the separate sentencing proceeding and shall not be relitigated. Where the jury is to determine sentences for concurrent counts of murder in the first degree, the aggravating factor included in each count shall be deemed to be an aggravating factor for the purpose of the jury's consideration in determining the sentence to be imposed on each such count.

* * *

7. (a) The people may present evidence at the sentencing proceeding to prove that in the ten year period prior to the commission of the crime of murder in the first degree for which the defendant was convicted, the defendant has previously been convicted of two or more offenses committed on different occasions; provided, that each such offense shall be either (i) a class A felony offense other than one defined in article two hundred twenty of the penal law, a class B violent felony offense specified in paragraph (a) of subdivision one of section 70.02 of the penal law, or a felony offense under the penal law a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death, or (ii) an offense under the laws of another state or of the United States punishable by a term of imprisonment of more than one year a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death. For the purpose of this paragraph, the term "deadly weapon" shall have the meaning set forth in subdivision twelve of section 10.00 of the penal law. In calculating the ten year period under this paragraph, any period of time during which the defendant was incarcerated for any reason between the time of commission of any of the prior felony offenses and the time of commission of the crime of murder in the first degree shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration. The defendant`s conviction of two or more such offenses shall, if proven at the sentencing proceeding, constitute an aggravating factor.

(b) In order to be deemed established, an aggravating factor set forth in this subdivision must be proven by the people beyond a reasonable doubt and the jury must unanimously find such factor to have been so proven. The defendant may present

evidence relating to an aggravating factor defined in this subdivision and either party may offer evidence in rebuttal. Any evidence presented by either party relating to such factor shall be subject to the rules governing admission of evidence in the trial of a criminal action.

(c) Whenever the people intend to offer evidence of an aggravating factor set forth in this subdivision, the people must within a reasonable time prior to trial file with the court and serve upon the defendant a notice of intention to offer such evidence. Whenever the people intend to offer evidence of the aggravating factor set forth in paragraph (a) of this subdivision, the people shall file with the notice of intention to offer such evidence a statement setting forth the date and place of each of the alleged offenses in paragraph (a) of this subdivision. The provisions of section 400.15 of this chapter, except for subdivisions one and two thereof, shall be followed.

* * *

11. (a) The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed. Any member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established.

* * *

No. 03-1570

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

STATE OF NEW YORK,

Petitioner,

—v.—

ANGEL L. MATEO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) should remain an impediment to the New York State legislature's attempt to create a comprehensive and protective state death penalty statute that suffers from none of the infirmities identified in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), but that permits a defendant who is facing the death penalty to plead guilty and be assured a lesser maximum sentence than he would be eligible to receive if convicted after trial.

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INTEREST OF THE *AMICUS CURIAE* THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION[1]

The sixty-two District Attorneys of New York State, as represented by the New York State District Attorneys Association, have a keen interest in this Court's resolution of the question presented by this case in that they are charged with implementing the capital punishment scheme enacted by New York State's Legislature in 1995. The District Attorneys of New York State, accordingly, have an interest in the proper resolution of the question presented—whether a defendant charged with capital murder may plead guilty with the assurance that he will face a prison sentence rather than the death penalty—as such resolution will effect all future capital prosecutions in the state.

This brief is submitted upon the written consent of both of the parties to this proceeding.

STATEMENT OF THE CASE

On September 1, 1995, New York reinstated the death penalty for certain classes of murder. *See* N.Y. Penal Law § 125.27. The death penalty bill, which comprised thirty-one single-spaced pages and is annexed to this brief as Appendix A, codified all of this Court's post-*Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) decisions and went further in protecting accused capital murderers (e.g., the scheme limited capital punishment to those who committed their crimes after the age of eighteen [N.Y. Penal Law

[1] No counsel for any party to this proceeding authored this brief, in whole or in part. The New York Prosecutors Training Institute, a not-for-profit corporation created in 1995 by the New York State District Attorneys Association, contributed to the preparation and submission of this brief.

§ 125.27(1)(b)] and prohibited capital punishment for the mentally retarded [N.Y.C.P.L. § 400.27(12)]). The bill provided a comprehensive and protective scheme for the prosecution of capital defendants in New York and comported with New York's longstanding state constitutional prohibition of jury trial waivers for crimes that are punishable by death. N.Y. Const. Art. I, § 2; N.Y.C.P.L. § 320.10(1).

As part of this scheme, therefore, the New York statute requires that, when the State seeks the death penalty, the defendant's guilt must be determined at a jury trial to ensure that capital cases are "tried before the tribunal which the Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. 24, 36, 85 S.Ct. 783, 790, 13 L.Ed.2d 630, 638 (1965). Accordingly, if a defendant charged with Murder in the First Degree was convicted upon a guilty plea, he faced a maximum sentence of life without the possibility of parole. A defendant convicted after trial, however, faced a maximum sentence of death.

In *Matter of Hynes v. Tomei, Matter of Relin v. Connell*, 92 N.Y.2d 613, 684 N.Y.S.2d 177, 706 N.E.2d 1201 (1998), *cert. denied*, 527 U.S. 1015, 119 S.Ct. 2359, 144 L.Ed.2d 254 (1999), an interlocutory appeal in the case now before this Court on direct review, finding itself constrained by this Court's pre-*Furman* decision in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the New York Court of Appeals declared that the plea provisions of New York's death penalty statute were unconstitutional and, finding the provisions severable, excised them from the statute. Specifically, the Court of Appeals held that, because the statute created "two levels of penalty for the same offense, imposing death only on those who assert innocence and proceed to trial," *Matter of Hynes v. Tomei*, 92

N.Y.2d at 620, 684 N.Y.S.2d at 179, 706 N.E.2d at 1203, the statute violated the federal constitution in the same way that the death penalty provision of the Federal Kidnaping Act did—the statutory sentencing disparity "imposed an impermissible burden" on the exercise of Fifth and Sixth Amendment rights by defendants who sought a jury trial, and "needlessly encouraged" defendants to waive these rights. *United States v. Jackson*, 390 U.S. at 583, 88 S.Ct. at 1217, 20 L.Ed.2d at 148. The New York high court felt it was obligated to reach this conclusion despite its acknowledgement that this Court had not "revisited Jackson and its progeny in 20 years and that these cases might be decided differently today in light of the increased significance of plea bargaining and substantial changes in the administration of capital punishment." *Matter of Hynes v. Tomei*, 92 N.Y.2d at 629, 684 N.Y.S.2d at 185, 706 N.E.2d at 1209.

The State filed a petition for a writ of *certiorari* in the *Hynes* and *Relin* cases, arguing that this Court should revisit its decision in *United States v. Jackson*, but that petition was denied on June 14, 1999. *Hynes v. Tomei*, 527 U.S. 1015, 527 S.Ct. 1015, 144 L.Ed.2d 254 (1999).

By the time the New York Court of Appeals had issued its decision in *Matter of Hynes v. Tomei and Matter of Relin v. Connell*, Angel Mateo had been tried and convicted of first-degree murder and, after a separate sentencing proceeding, was sentenced to death by the same jury that convicted him. Mateo appealed his judgment of conviction and sentence directly to the New York Court of Appeals arguing, among other things, that his death sentence must be vacated because he had proceeded to trial before the capital murder plea provisions were stricken from the statute in *Matter of Hynes v. Tomei*, at a time when his Fifth and Sixth Amendment rights were impermissibly burdened.

The State, in response, maintained that this Court's decision in *United States v. Jackson* had not stood the test of time, but argued additionally that, even if the New York Court of Appeals adhered to its just-pronounced ruling in *Matter of Hynes v. Tomei*, vacatur of defendant's death sentence was unwarranted. In a decision and order dated February 24, 2004, the New York Court of Appeals, rejecting the State's arguments, modified defendant's judgment of conviction by vacating his death sentence, and otherwise affirmed his conviction.

SUMMARY OF ARGUMENT

United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), stands as an impediment to the creation and implementation of a modern death penalty statute. The *Jackson* decision was premised on the then-prevailing notions that "death is different" and that the State and capital defendants were unequal adversaries at the plea-bargaining table. But as States, like New York, have crafted their death penalty statutes to comport with this Court's evolving capital jurisprudence, the concerns presented by the statute scrutinized in *Jackson*, a creature of the pre-*Furman* death penalty landscape, are no longer present. The bifurcation requirement, the requirement that jury sentencing discretion be appropriately channeled, and the additional protections afforded by New York's statute, such as the requirement that two capital-qualified counsel be appointed to represent capital defendants, have leveled the capital plea-bargaining playing field. Accordingly, a statutory scheme like New York's, which permits a death sentence only after a defendant's guilt has been established beyond a reasonable doubt to the satisfaction of a unanimous jury, neither "needlessly encourage[s]" guilty pleas nor

"impose[s] an impermissible burden" on the exercise of a defendant's Fifth and Sixth Amendment rights.

Nevertheless, the New York Court of Appeals, unlike the high court of Arkansas when analyzing a similar statutory scheme, believed that it was constrained to declare New York's capital plea provisions unconstitutional under *Jackson*. The petition for a writ of *certiorari* should be granted, therefore, so that this Court may decide the question explicitly left open in *Jackson*—whether the holding in *Jackson* should be applied to a modern, bifurcated death penalty scheme.

Alternatively, even if this Court is unpersuaded that the differences between New York's modern death penalty statute and that portion of the Federal Kidnaping Act condemned in *Jackson* are constitutionally significant, this Court should nevertheless grant the petition for a writ of *certiorari*. Review of this case would allow the Court to make explicit what this Court's post-*Jackson* plea bargaining cases, as well as this Court's decisions applying a uniform analysis to claims arising from both capital and non-capital cases, have made implicit—that application of *Jackson*'s rationale to a modern and comprehensive death penalty statute like New York's has inappropriately and unnecessarily limited the ability of prosecutors and capital defendants to engage in plea negotiations with the same freedom as non-capital defendants.

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to declare for the first time whether the rationale of *United States v. Jackson*, pronounced when analyzing a pre-*Furman* death penalty statute (18 U.S.C. § 1201[a]), should apply to a death penalty statute that is altogether dif-

ferent. Alternatively, the case presents this Court with the opportunity to unequivocally announce that cases decided since *Jackson*, at the very least, render its rationale obsolete, or at most, overrule it. Accordingly, the New York State District Attorneys Association asks that the Court grant petitioner's petition for a writ of *certiorari*.

A. There Is No Jurisdictional Impediment to This Court's Review of the Instant Case.

Contrary to respondent's assertions, this Court may properly hear and decide the claims presented by defendant's case. Throughout defendant's direct appeal to the Court of Appeals, the State maintained—despite the fact that the New York high court had already rejected the claim in defendant's very own case—that *United States v. Jackson* was no longer good law and had not stood the test of time. *See* State's Brief in the New York Court of Appeals at 130.

The New York Court of Appeals necessarily rejected the State's argument when it vacated defendant's death sentence pursuant to its decision in the interlocutory appeal in the case, *Matter of Hynes v. Tomei and Matter of Relin v. Connell*. The Federal Constitutional claim at issue in this case, therefore, was adequately presented to, and decided by, the state court and is properly presented to this Court for review.

The "concession" to which defendant points in his brief in opposition to the petition does not change the analysis. The statements by the representatives of the Monroe County District Attorney and the New York State Attorney General were made during oral argument when asked to assume that the New York Court of Appeals was not going to abandon its recent holding in the interlocutory appeal in this very case, *Matter of*

Relin v. Connell. The State conceded it was bound by the law of the case, but in no way did the State concede that *United States v. Jackson* had continuing vitality. Accordingly, the issues presented in the petition for a writ of *certiorari* are properly before this Court.

B. The New York Court of Appeals Incorrectly Extended the Rationale of *United States v. Jackson* to an Altogether Different Statute.

The 1995 statute that reinstated the death penalty in New York does not, in any way, resemble the statute declared unconstitutional by this Court in *United States v. Jackson*. Accordingly, even if this Court were to adhere to the basic underpinnings of its holding in *Jackson*, New York's death penalty scheme is so different from the statute considered in *Jackson* that this Court should find that *Jackson* is inapplicable to New York's statute.

The death penalty statute scrutinized in *Jackson* and the death penalty statute enacted by the New York State Legislature in 1995, are so different that applying *Jackson* to the New York statute is unwarranted. Not only did the Federal Kidnaping Act reviewed in *Jackson* not require the death of the victim as a prerequisite to receiving a death sentence, the statute provided the defendant with a unitary trial in which the jury had unfettered sentencing discretion. In particular, the statute did not require the jury to balance aggravating and mitigating factors before deciding whether death was the appropriate sentence. In fact, the statute did not even allow the defendant to present mitigation evidence. *See United States v. Jackson*, 390 U.S. at 570-571, 88 S.Ct. at 1210-1211, 20 L.Ed.2d at 141. Rather, if convicted, death was the automatic penalty unless the jury found otherwise.

In stark contrast to the statute at issue in *Jackson*, the New York death penalty scheme severely confines the

discretion of a prosecutor to charge a defendant with a capital crime and a sentencing jury's discretion to impose a death sentence to a narrow set of circumstances, all of which require an intentional murder. *See* N.Y. Penal Law § 125.27. Moreover, the scheme provides for a bifurcated trial, in which the defendant's guilt and the penalty to be imposed are determined separately. *See* N.Y.C.P.L. § 400.27. Notably, in *Jackson*, this Court expressly left open the question of whether its analysis would differ when examining a statute that provided for a bifurcated trial. *United States v. Jackson*, 390 U.S. at 573, 88 S.Ct. at 1211, 20 L.Ed.2d at 142.

These differences between the two statutes alone eliminate *Jackson* as useful precedent in light of this Court's decisions after *Jackson* and before the enactment of New York's death penalty statute. Four years after its decision in Jackson, the Supreme Court decided *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), in which the Court declared unconstitutional a non-bifurcated death penalty statute that did not channel the jury's sentencing discretion on the ground that the statute resulted in the "wanton and freakish" imposition of the death penalty. *Furman v. Georgia*, 408 U.S. at 312, 92 S.Ct. at 2763, 33 L.Ed.2d at 390. Then, four years later, when this Court reviewed the newly-enacted Georgia death penalty statute that was passed in response to *Furman*, it found the death penalty statute—which mandated a bifurcated proceeding and enumerated ten aggravating factors that the jury was to consider at the penalty phase—constitutional. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Before the death penalty could even be considered, the jury had to find that the prosecution had proven at least one aggravating factor beyond a reasonable doubt and, even then, the jury could exercise leniency and decline to impose a death sentence regardless of whether or not mitigation

evidence was presented. *Gregg v. Georgia*, 428 U.S. at 164-165, 96 S.Ct. at 2920-2922, 49 L.Ed.2d at 869-870. Bifurcation and channeled sentencing discretion were crucial to creating a constitutional death penalty scheme —components that were not present in death penalty provisions of the Federal Kidnaping Act. In holding that this Court's *Jackson* decision required the New York Court of Appeals to invalidate the plea provisions of New York's death penalty statute, therefore, the New York high court erred. This Court has never applied the *Jackson* rationale to such a scheme.

In addition to denying a defendant a bifurcated capital trial and giving the sentencer unbridled discretion, the Federal Kidnaping Act condemned in *Jackson* permitted a defendant to avoid the death penalty, regardless of the prosecutor's intentions, if he consented to a bench trial or offered to plead guilty, thus waiving his right to a jury trial. *See United States v. Jackson*, 390 U.S. at 571, 88 S.Ct. at 1210, 138 L.Ed.2d at 141. New York's statute, by contrast and in conformity with the State's constitutional prohibition of jury trial waivers in capital cases (N.Y. Const. Art I, § 2), makes no such allowance. Rather, under the New York statute, a defendant against whom the prosecutor seeks the death penalty must proceed to a jury trial. N.Y.C.P.L. § 220.10(5)(e). Thus, the New York statute, unlike the statute at issue in *Jackson*, not only protects a capital defendant's right to a jury trial, but actually mandates that he exercise that right. Accordingly, the New York death penalty scheme does not contain provisions that "needlessly encourage" guilty pleas or "needlessly penalize" defendants who proceed to trial. The statute, therefore, does not implicate the concerns present in *Jackson*.

Further distinguishing New York's death penalty scheme from that presented to this Court in *Jackson* is

the fact that, in New York, every defendant facing a capital charge is entitled to two capital-certified counsel who have the ability, through generous funding, to conduct extensive guilt-phase and penalty-phase investigations designed to uncover evidence to assist with the defense of the charges as well as the penalty. These counsel are thus enabled to guide a defendant facing the death penalty through the plea negotiation process as well as adequately and accurately inform capital defendants of the lengthy post-conviction review process that would inevitably follow any possible death sentence. These benefits, which are not constitutionally mandated, severely undermine the argument that a comprehensive death penalty scheme such as New York's has the effect of "needlessly encouraging" guilty pleas. Additional assurance that capital defendants in New York will not be "needlessly encouraged" to waive their trial rights and plead guilty is derived from the fact that, under New York's scheme, the death penalty is prohibited in cases in which a defendant is under eighteen years of age or is mentally retarded.

In light of all of these important differences between the statute analyzed in *Jackson* and New York's death penalty statute, the New York Court of Appeals wrongly concluded that the plea provisions enacted as part of the comprehensive and protective scheme violated a defendant's Fifth and Sixth Amendment rights and erroneously extended the rationale of *Jackson* to a statute to which it is inapplicable. Accordingly, this Court should grant the writ for a petition for *certiorari* so that it may decide the issue explicitly left open in *Jackson*—whether the rationale of *Jackson* should extend to modern, bifurcated death-penalty scheme such as New York's.

C. This Court's Post-*Jackson* Plea Bargaining Decisions Have Undermined the Rationale of *Jackson* Such That It Has Been Implicitly Overruled.

Even if this Court finds that the differences between New York's statute and the Federal Kidnaping Act declared unconstitutional in *United States v. Jackson* are not constitutionally significant, it should nevertheless grant the petition for a writ of *certiorari*—as urged by both the Monroe County District Attorney and the New York State Attorney General—to make explicit what is implicit in this Court's post-*Jackson* plea-bargaining cases—that *Jackson* has not stood the test of time and should be overruled. Moreover, this case would provide this Court with the opportunity to reconcile a "split" between the New York and Arkansas state high courts' resolutions of this issue.

In *Jackson*, this Court invalidated that portion of the Federal Kidnaping Act (18 U.S.C. § 1201[a]) that provided for different maximum penalties for those defendants who were convicted after a jury trial and those who were convicted after a guilty plea or bench trial. Those convicted after a jury verdict of guilty automatically faced the death penalty and could receive that sentence if a jury, with unbridled discretion, so recommended. In contrast, a defendant who pleaded guilty or chose to be tried by a Judge instead of a jury could not receive a death sentence. 390 U.S. at 570-71, 88 S.Ct. at 1210-1211, 20 L.Ed.2d at 141.

This Court held that the statute was unconstitutional because its "inevitable effect" was to "discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." 390 U.S. at 581-583, 88 S.Ct. at 1216-1217, 20 L.Ed.2d at 146-148. This statutorily prescribed scheme that permitted "trading" the right to a

jury trial for a guaranteed reduced sentence was impermissible, the Court held, because it placed a burden on the exercise of constitutional rights. The "evil" in the Federal Kidnaping scheme was "not that it necessarily coerce[d] guilty pleas and jury waivers but simply that it needlessly encourage[d] them." 390 U.S. at 583, 88 S.Ct. at 1217, 20 L.Ed.2d at 148. The inducement to waive the right to a jury trial and plead guilty, in other words, was simply too great to resist.

But almost as soon as the ink was dry on the *Jackson* decision, the evolution of this Court's plea-bargaining jurisprudence slowly chipped away at *Jackson*'s rationale. Indeed, since *Jackson*, this Court has not only acknowledged the reality of plea bargaining in the criminal justice system, but has explicitly endorsed the constitutional soundness, necessity, and benefits of plea bargaining to the administration of criminal justice.

For example, in *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), in which the Court examined the legality of a guilty plea taken pursuant to the very statutory scheme that it declared unconstitutional in *Jackson*, the Court refused to vacate the defendant's voluntary and knowing guilty plea. The Court acknowledged that guilty pleas are not constitutionally forbidden and can be mutually advantageous to the State and a defendant in that they provide the hope or the assurance of a lesser penalty than would be imposed upon conviction after trial. *Brady v. United States*, 397 U.S. at 752, 90 S.Ct. at 1471, 25 L.Ed.2d at 758.

Next, only three years after *Jackson*, the Supreme Court dispelled any "lingering doubts about the legitimacy of the practice", *Blackledge v. Allision*, 431 U.S. 63, 76, 97 S.Ct. 1621, 1630, 52 L.Ed.2d 136, 148 (1977), of plea bargaining in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The *Santo-*

bello Court declared that plea bargaining was a "highly desirable" and "essential component of the administration of justice", which, "[p]roperly administered, is to be encouraged." 404 U.S. at 260-261, 92 S.Ct. at 498, 30 L.Ed.2d at 432.[2] Indeed, *Santobello*'s "open acknowledgement of th[e] previously clandestine practice" of plea bargaining was later described as a fundamental change from *Jackson*. *See Bordenkircher v. Hayes*, 434 U.S. 357, 361-362, 98 S.Ct. 663, 667, 54 L.Ed.2d 604, 609-610 (1978).

This Court's decision in *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L. Ed.2d 714 (1973) further eroded *Jackson*'s foundation. In *Chaffin*, the defendant had been convicted and sentenced for robbery by a jury. After being granted a new trial at which the jury imposed a harsher sentence, defendant argued that the possibility of a lengthier sentence upon reconviction impermissibly chilled the exercise of his right to demand a jury trial for his retrial. In affirming the defendant's conviction, this Court, citing *Brady v. United States*, warned that *Jackson* did not hold that the Constitution "forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Chaffin v. Stynchcombe*, 412 U.S. at 30, 93 S.Ct. at 1984, 36 L.Ed.2d at 725. Rather, in stark contrast to the language in *Jackson*, the Court acknowledged that, inherent in a plea offer is some benefit to the defendant that would discourage him from exercising his right to a trial. And, the Court noted that the discouraging effect was inherent in a system in

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[2] This Court reaffirmed the importance of plea bargaining to the criminal justice system only last week in *United States v. Dominguez Benitez*, 542 U.S. __, __ S.Ct. __, __ L.Ed.2d __, Slip op. at 8 (June 14, 2004), when it declared that guilty pleas "are indispensable in the operation of the modern criminal justice system." (citation omitted).

which plea bargains were tolerated and encouraged. *Chaffin v. Stynchcombe*, 412 U.S. at 31, 93 S.Ct. at 1985, 36 L.Ed.2d at 726. The Constitution, the Court concluded, is not violated by such a system.

Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), further undermined *Jackson*'s central premise. In that case, during plea negotiations with the defendant, the prosecutor promised to recommend less than the maximum sentence if the defendant pleaded guilty to the indictment, but stated that, if the defendant did not plead guilty and save the court "the inconvenience and necessity of a trial", he would reindict the defendant as a habitual offender, thus subjecting the defendant to a mandatory life sentence upon conviction. *Bordenkircher v. Hayes*, 434 U.S. at 358, 98 S.Ct. at 665, 54 L.Ed.2d at 607. Defendant rejected the plea offer and was subsequently charged, convicted, and sentenced to a mandatory life sentence pursuant to the state's habitual offender act. 434 U.S. at 359, 98 S.Ct. at 665-666, 54 L.Ed.2d at 608. In upholding the defendant's conviction, the Court wrote that, though the risk of more severe punishment if he goes to trial "may have a 'discouraging effect on the defendant's assertion of his trial rights,' " this effect was simply a natural consequence of plea bargaining and was not constitutionally impermissible. 434 U.S. at 364, 98 S.Ct. at 668, 54 L.Ed.2d at 611 (quoting *Chaffin v. Stynchcombe*, 412 U.S. at 31, 93 S.Ct. at 1985, 36 L.Ed.2d at 726). This holding was reaffirmed in *United States v. Goodwin*, 457 U.S. 368, 378, 102 S.Ct. 2485, 2491, 73 L.Ed.2d 74, 84 (1982), when the Court explained that "[t]he outcome in *Bordenkircher*, was mandated by this Court's acceptance of plea negotiation as a legitimate process."

Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) should have dealt the final blow to

Jackson's crumbling rationale. The *Corbitt* majority extended the rationale of *Bordenkircher v. Hayes* to uphold a sentencing scheme that, in a non-capital context, resembled the statutory scheme presented in *Jackson*. Specifically, the New Jersey statute, like the Federal Kidnaping Act, provided for a lesser maximum punishment for defendants convicted after a *non vult* or a *nolo contendere* plea than the maximum punishment permitted for a defendant convicted after a trial. *Corbitt v. New Jersey*, 439 U.S. at 216-217, 99 S.Ct. at 496, 58 L.Ed.2d at 472-473. In rejecting the defendant's *Jackson* claim, the Court distinguished the New Jersey statute from the Federal Kidnaping Act by noting that the New Jersey statute did not provide for the possibility of a death sentence. *Corbitt v. New Jersey*, 439 U.S. at 217, 99 S.Ct. at 496, 58 L.Ed.2d at 473. Rather, the Court decided, the conclusion that inevitably followed from the Court's decisions in *Brady v. United States*, *Chaffin v. Stynchcombe*, and *Bordenkircher v. Hayes*, was that the mere fact that a guilty plea provision might encourage a defendant to plead guilty and, as a necessary corollary, discourage him from exercising his right to a trial, did not render the scheme unconstitutional:

> While confronting a defendant with the risk of a more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.

439 U.S. at 220-221, 99 S.Ct. at 498, 58 L.Ed.2d at 475 (internal citations, quotes, and brackets omitted).

The fact that the difference in the maximum punishments to which a defendant would be subjected was statutorily prescribed rather than the result of the plea-bargaining process was immaterial. The Court refused to prohibit a state legislature from providing for the possibility of leniency in return for a guilty plea while allowing a prosecutor to do the same through his or her charging decisions. *Corbitt v. New Jersey*, 439 U.S. at 224, 99 S.Ct. at 500, 58 L.Ed.2d at 477. This logical and necessary extension of *Brady*, *Chaffin*, and *Bordenkircher* prompted the dissenting Justices in *Corbitt* to lament that "[t]he holding in *Jackson*, though not specifically overruled, has been divorced from the rationale on which it rested." *Corbitt v. New Jersey*, 439 U.S. at 229, 99 S.Ct. at 503, 58 L.Ed.2d at 480-481.

The plea provisions of New York's death penalty statute create precisely the same situation as the statute sanctioned in *Corbitt*—leniency for a defendant who pleads guilty. This structure is consistent with this Court's post-*Jackson* decisions and should no longer be constitutionally prohibited simply because the death penalty is involved.

Moreover, granting a petition for a writ of *certiorari* in this case would give this Court the opportunity to resolve the "split" between the New York and Arkansas state high courts' treatment of the *Jackson* issue. The Arkansas high court, upon analyzing a statute with plea provisions that are virtually identical to New York's, rejected a *Jackson* claim, noting that "the holding of *Jackson* has been eroded in recent decisions." *Ruiz & Denton v. State*, 275 Ark. 410, 413, 630 S.W.2d 44, 46, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d

148 (1982).[3] The New York high court, in contrast, determined that *Jackson* was still binding precedent.

In light of this Court's plea bargaining jurisprudence subsequent to 1968, *Jackson* is an anomaly. Accordingly, this Court should grant the writ for a petition for *certiorari* so that it may make explicit what has been implicit in this Court's post-*Jackson* decisions—that *Jackson* has not stood the test of time and should be overruled.

D. Other decisions from this Court Suggest That *Jackson*'s Precedential Value Has Been So Diminished That It Is No Longer Good Law.

Not only has this Court's plea-bargaining jurisprudence wholly undermined the rationale of *Jackson*, but this Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), examined in conjunction with the numerous decisions from this Court that analyze capital and non-capital cases under the same legal standard, has continued this Court's shift away from the philosophical underpinnings of *Jackson*. Accordingly, *Corbitt v. New Jersey* and *United States v. Jackson* are irreconcilable, and this Court should grant the petition for *certiorari* to explicitly declare the same.

This Court's decision in *Jackson* can be viewed as the result of this Court's then-prevailing view that the possibility of capital punishment required utilizing different, more stringent standards for reviewing capital cases. Since *Jackson*, however, this Court has, in a variety of contexts, acknowledged that, though death may be "dif-

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[3] The United States Court of Appeals for the Eighth Circuit, reviewing the state conviction of an Arkansas death-row inmate, also rejected a *Jackson* claim. *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983).

ferent" (*see Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 [1978]), it is not so different that otherwise analogous claims should be subject to different standards of review simply because one claim may arise from a death penalty case. *See, e.g., Boyde v. California*, 494 U.S. 370, 376, 110 S.Ct. 1190, 1195, 108 L.Ed.2d 316, 326 (1990) (same standard for reviewing jury instructions in capital and non-capital cases); *Smith v. Murray*, 477 U.S. 527, 538-539, 106 S.Ct. 2661, 2668-2669, 91 L.Ed.2d 434, 447 (1986) (principles governing habeas review do not differ depending upon the nature of the penalty the State imposes for a crime); *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984) (same standard for ineffective assistance of counsel claims in capital and non-capital cases); *see also Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-711 (1967) (same harmless error standard on direct review for capital and non-capital defendants).

Indeed, in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), this Court rejected a capital defendant's claim that the death penalty presents such a unique situation that he should have a lesser burden of proving discriminatory prosecution than non-capital defendants have. Rather, this Court acknowledged that the criminal justice system is a unitary system and, therefore, there is no reason to ignore well settled presumptions underlying that system simply because a defendant faces execution. *McCleskey v. Kemp*, 481 U.S. at 313, 107 S.Ct. at 1778, 95 L.Ed.2d at 292.

And in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), this Court overruled *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) as inconsistent with *Apprendi v. New Jersey*, 530

U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because, to do otherwise, would leave in place a system in which the means for finding a fact upon which the legislature conditioned an **increase** in the maximum punishment for capital and non-capital defendants were different. Analagously, this Court should overrule *Jackson* as inconsistent with *Corbitt v. New Jersey* because, to do otherwise, would leave in place a system in which the means for obtaining a **decrease** in the maximum punishment for capital and non-capital defendants is different: a legislature may statutorily permit a non-capital defendant to ensure a decreased maximum sentence if he agrees to plead guilty, but may not permit a capital defendant to do the same.

This different standard has led to an "ironic twist", anticipated by the New York Court of Appeals in its decision in *Matter of Hynes v. Tomei, Matter of Relin v. Connell*, that the application of *Jackson* to New York's statute has "reduce[d] the flexibility of both prosecutors and defendants who wish to plea bargain in capital cases." 92 N.Y.2d at 629, 684 N.Y.S.2d at 185, 706 N.E.2d at 1209.

The effect of *Jackson* on New York's death penalty scheme is, accordingly, not limited, as respondent would have it, to at most four other defendants in New York. Rather, continued application of *Jackson* will impact every future New York defendant charged with a capital crime, states with untested statutory capital plea provisions similar to New York's, and every State that might seek to implement a statutory death penalty scheme similar to New York's.

Jackson, and only *Jackson*, was the basis for the New York Court of Appeals' decision to abandon the carefully considered State Legislature's rules governing guilty pleas in capital cases, resulting in unnecessary

constraints being placed upon a capital defendant's ability to negotiate an advantageous plea bargain. A rationale that has the effect of reducing the ability of defendants who face the most severe punishment to plea bargain is irreconcilable with this Court's post-*Jackson* determination to analyze capital and non-capital claims alike as well as with this Court's recognition that a system that precludes opportunities to dispense mercy "would be totally alien to our notions of criminal justice." *Gregg v. Georgia*, 428 U.S. at 199, 96 S.Ct. at 2937, 49 L.Ed.2d at 889.

Because the holding in *Jackson* is premised upon the now-abandoned notion that death penalty claims should be analyzed under different standards than claims raised in non-capital cases, this Court should grant the petition for *certiorari* to explicitly overrule this remnant from *Jackson*.

CONCLUSION

For all of the reasons explained above, this Court should grant the petition for a writ of *certiorari* to review the decision and judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX

STATE OF NEW YORK

S. 2850 A. 4843

1995-1996 Regular Sessions

SENATE – ASSEMBLY

March 2, 1995

IN SENATE—Introduced by Sens. VOLKER, BRUNO, PADAVAN, SALAND, NOZZOLIO, COOK, DEFRANCISCO, DICARLO, FARLEY, GOODMAN, HOBLOCK, HOFFMANN, HOLLAND, JOHNSON, KUEL, LARKIN, LAVALLE, LEIBELL, LEVY, LIBOUS, MALTESE, ONORATO, PRESENT, RATH, SEARS, SEWARD, SKELOS, SPANO, STACHOWSKI, STAFFORD, TRUNZO, TULLY, VELELLA, WRIGHT,—(at request of the Governor)—read twice and ordered printed, and when printed to be committed to the Committee on Codes

IN ASSEMBLY—Introduced by M. of A. VITALIANO, ROBACH, KAUFMAN, TOKASZ, HIKIND, KLEIN—Multi-Sponsored by—M. of A. ABBATE, COLMAN, CONNELLY, CROWLEY, DESTITO, GROMACK, KEANE, MAGEE, PORDUM, SEMINERIO, TOCCI, WEISENBERG—(at request of the Governor)—read once and referred to the Committee on Codes

AN ACT to amend the penal law, the criminal procedure law, the judiciary law, the county law, the correction law and the executive law, in relation to imposition of the death penalty in certain additional instances and establishing a procedure therefor and to the assignment of counsel and related services in criminal actions in which a death sentence may be imposed and

repealing subdivision 3 of section 112 and article 22-B of the correction law relating to imposition of such penalty

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EXPLANATION—Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 60.05 of the penal law, as amended by chapter 410 of the laws of 1979, is amended to read as follows:

2. Class A felony. Except as provided in subdivisions three and four of section 70.06 of this chapter, every person convicted of a class A felony must be sentenced to imprisonment in accordance with section 70.00, unless such person is convicted of either murder in the first degree and is sentenced [to death] in accordance with section 60.06 or of a class A-II felony and is sentenced to probation in accordance with section 65.00.

§ 2. Section 60.06 of the penal law, as added by chapter 367 of the laws of 1974, is amended to read as follows:

§ 60.06 Authorized disposition; murder in the first degree.

When a person is convicted of murder in the first degree as defined in section 125.27 *of this chapter*, the court shall, *in accordance with the provisions of section 400.27 of the criminal procedure law,* sentence the defendant to death, *to life imprisonment without parole*

in accordance with subdivision five of section 70.00 of this chapter or to a term of imprisonment for a class A-I felony other than a sentence of life imprisonment without parole, in accordance with subdivisions one through three of section 70.00 of this chapter.

§ 3. Subdivision 1 of section 70.00 of the penal law, as amended by chapter 277 of the laws of 1973, is amended to read as follows:

1. Indeterminate sentence. Except as provided in [subdivision] *subdivisions* four *and five*, a sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

§ 4. Subparagraph (i) of paragraph (a) of subdivision 3 of section 70.00 of the penal law, as amended by chapter 276 of the laws of 1973, is amended to read as follows:

(i) For a class A-I felony, such minimum period shall not be less than fifteen years nor more than twenty-five years*; provided that where a sentence, other than a sentence of death or life imprisonment without parole, is imposed upon a defendant convicted of murder in the first degree as defined in section 125.27 of this chapter such minimum period shall be not less than twenty years nor more than twenty-five years.*

§ 5. Section 70.00 of the penal law is amended by adding a new subdivision 5 to read as follows:

5. Life imprisonment without parole. Notwithstanding any other provision of law, a defendant sentenced to life

imprisonment without parole shall not be or become eligible for parole or conditional release. For purposes of commitment and custody, other than parole and conditional release, such sentence shall be deemed to be an indeterminate sentence. A defendant may be sentenced to life imprisonment without parole only upon conviction for the crime of murder in the first degree as defined in section 125.27 of this chapter and in accordance with the procedures provided by law for imposing a sentence for such crime.

§ 6. Section 70.20 of the penal law is amended by adding a new subdivision 2-a to read as follows:

2-a. Sentence of life imprisonment without parole. When a sentence of life imprisonment without parole is imposed, the court shall commit the defendant to the custody of the state department of correctional services for the remainder of the life of the defendant.

§ 7. Subdivision 1 of section 125.27 of the penal law, as added by chapter 367 of the laws of 1974, is amended to read as follows:

1. With intent to cause the death of another person, he causes the death of such person *or of a third person*; and

(a) Either:

(i) the *intended* victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was [killed] *at the time of the killing engaged* in the course of performing his official duties, and the defendant knew or reasonably should have known that the *intended* victim was a police officer; or

(ii) *the intended victim was a peace officer as defined in paragraph a of subdivision twenty-one, subdivision twenty-three, twenty-four or sixty-two (employees of the*

division for youth) of section 2.10 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was such a uniformed court officer, parole officer, probation officer, or employee of the division for youth; or

(iii) the *intended* victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was [killed] *at the time of the killing engaged* in the course of performing his official duties, and the defendant knew or reasonably should have known that the *intended* victim was an employee of a state correctional institution or a local correctional facility; or

[(iii)] *(iv)* at the time of the commission of the [crime] *killing*, the defendant was confined in a state correctional institution[,] or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the [crime] *killing*, the defendant had escaped from such confinement or custody *while serving such a sentence* and had not yet been returned to such confinement or custody; [and] *or*

(v) the intended victim was a witness to a crime committed on a prior occasion and the death was caused for the purpose of preventing the intended victim's testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced, or the intended victim had previously testified in a criminal

action or proceeding and the killing was committed for the purpose of exacting retribution for such prior testimony, or the intended victim was an immediate family member of a witness to a crime committed on a prior occasion and the killing was committed for the purpose of preventing or influencing the testimony of such witness, or the intended victim was an immediate family member of a witness who had previously testified in a criminal action or proceeding and the killing was committed for the purpose of exacting retribution upon such witness for such prior testimony. As used in this subparagraph "immediate family member" means a husband, wife, father, mother, daughter, son, brother, sister, stepparent, grandparent, stepchild or grandchild; or

(vi) the defendant committed the killing or procured commission of the killing pursuant to an agreement with a person other than the intended victim to commit the same for the receipt, or in expectation of the receipt, of anything of pecuniary value from a party to the agreement or from a person other than the intended victim acting at the direction of a party to such agreement; or

(vii) the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary in the first degree or second degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree; provided however, the victim is not a participant in one of

the aforementioned crimes and, provided further that, unless the defendant's criminal liability under this subparagraph is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter, this subparagraph shall not apply where the defendant's criminal liability is based upon the conduct of another pursuant to section 20.00 of this chapter; or

(viii) as part of the same criminal transaction, the defendant, with intent to cause serious physical injury to or the death of an additional person or persons, causes the death of an additional person or persons; provided, however, the victim is not a participant in the criminal transaction; or

(ix) prior to committing the killing, the defendant had been convicted of murder as defined in this section or section 125.25 of this article, or had been convicted in another jurisdiction of an offense which, if committed in this state, would constitute a violation of either of such sections; or

(x) the defendant acted in an especially cruel and wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim's death. As used in this subparagraph, "torture" means the intentional and depraved infliction of extreme physical pain; "depraved" means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain; or

(xi) the defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-

four months when committed in a similar fashion or pursuant to a common scheme or plan; or

(xii) the intended victim was a judge as defined in subdivision twenty-three of section 1.20 of the criminal procedure law and the defendant killed such victim because such victim was, at the time of the killing, a judge; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

§ 8. Paragraph (b) of subdivision 3 of section 200.60 of the criminal procedure law is amended to read as follows:

(b) If the defendant denies the previous conviction or remains mute, the people may prove that element of the offense charged before the jury as a part of their case. *In any prosecution under subparagraph (ix) of paragraph (a) of subdivision one of section 125.27 of the penal law, if the defendant denies the previous murder conviction or remains mute, the people may prove that element of the offense only after the jury has first found the defendant guilty of intentionally causing the death of a person as charged in the indictment, in which case the court shall then permit the people and the defendant to offer evidence and argument consistent with the relevant provisions of section 260.30 of this chapter with respect to the previous murder conviction.*

§ 9. Subdivision 6 of section 210.20 of the criminal procedure law, as added by chapter 209 of the laws of 1990, is amended to read as follows:

6. The effectiveness of an order reducing a count or counts of an indictment or dismissing an indictment and directing the filing of a prosecutor's information *or dismissing a count or counts of an indictment charging*

murder in the first degree shall be stayed for thirty days following the entry of such order unless such stay is otherwise waived by the people. On or before the conclusion of such thirty-day period, the people shall exercise one of the following options:

(a) Accept the court's order by filing a reduced indictment [or], by dismissing the indictment and filing a prosecutor's information, *or by filing an indictment containing any count or counts remaining after dismissal of the count or counts charging murder in the first degree,* as appropriate;

(b) Resubmit the subject count or counts to the same or a different grand jury within thirty days of the entry of the order or such additional time as the court may permit upon a showing of good cause; provided, however, that if in such case an order is again entered with respect to such count or counts pursuant to subdivision one-a of this section, such count or counts may not again be submitted to a grand jury. Where the people exercise this option, the effectiveness of the order further shall be stayed pending a determination by the grand jury and the filing of a new indictment, if voted, charging the resubmitted count or counts;

(c) Appeal the order pursuant to subdivision *one or* one-a of section 450.20. Where the people exercise this option, the effectiveness of the order further shall be stayed in accordance with the provisions of subdivision two of section 460.40.

§ 10. Paragraph (e) of subdivision 5 of section 220.10 of the criminal procedure law, as amended by chapter 410 of the laws of 1979, is amended to read as follows:

(e) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section

125.27 of the penal law*; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.*

§ 11. Subparagraph (vii) of paragraph (b) of subdivision 3 of section 220.30 of the criminal procedure law, as added by chapter 367 of the laws of 1974 and as renumbered by chapter 233 of the laws of 1980, is amended to read as follows:

(vii) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law*; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.*

§ 12. Subdivision 2 of section 220.60 of the criminal procedure law, as amended by chapter 548 of the laws of 1980, is amended to read as follows:

2. A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter: (a) a plea of guilty to part of the indictment pursuant to subdivision *three or* four but subject to the limitation in subdivision five of section 220.10, or (b) a plea of not responsible by reason of mental disease or defect to the indictment pursuant to section 220.15 of this chapter.

§ 13. The criminal procedure law is amended by adding a new section 250.40 to read as follows:

§ 250.40 Notice of intent to seek death penalty.

1. A sentence of death may not be imposed upon a defendant convicted of murder in the first degree unless, pursuant to subdivision two of this section, the people file with the court and serve upon the defendant a notice of intent to seek the death penalty.

2. In any prosecution in which the people seek a sentence of death, the people shall, within one hundred twenty days of the defendant's arraignment upon an indictment charging the defendant with murder in the first degree, serve upon the defendant and file with the court in which the indictment is pending a written notice of intention to seek the death penalty. For good cause shown the court may extend the period for service and filing of the notice.

3. Notwithstanding any other provisions of law, where the people file a notice of intent to seek the death penalty pursuant to this section the defendant shall be entitled to an additional sixty days for the purpose of filing new motions or supplementing pending motions.

4. A notice of intent to seek the death penalty may be withdrawn at any time by a written notice of withdrawal filed with the court and served upon the defendant. Once withdrawn the notice of intent to seek the death penalty may not be refiled.

§ 14. The criminal procedure law is amended by adding a new section 270.16 to read as follows:

§ 270.16 Capital cases; individual questioning for racial bias.

1. In any case in which the crime charged may be punishable by death, the court shall, upon motion of either party, permit the parties, commencing with the people, to examine the prospective jurors individually and outside the presence of the other prospective jurors regarding their qualifications to serve as jurors. Each party shall be afforded a fair opportunity to question a prospective juror as to any unexplored matter affecting his or her qualifications, including without limitation the possibility of racial bias on the part of the prospective juror, but the court shall not permit questioning that is repetitious or irrelevant, or questions as to a prospective juror's knowledge of rules of law. If necessary to prevent improper questioning as to any matter, the court shall personally examine the prospective jurors as to that matter. The scope of such examination shall be within the discretion of the court. After the parties have concluded their examinations of a prospective juror, the court may ask such further questions as it deems proper regarding the qualifications of the prospective juror.

2. The proceedings provided for in this section shall be conducted on the record; provided, however, that upon motion of either party, and for good cause shown, the court may direct that all or a portion of the record of such proceedings be sealed.

§ 15. Paragraph (f) of subdivision 1 of section 270.20 of the criminal procedure law, as amended by chapter 367 of the laws of 1974, is amended to read as follows:

(f) [There is a possibility that the] *The* crime charged [is] *may be* punishable by death and the prospective juror entertains such conscientious opinions either against or in favor of [the death penalty] *such punishment* as to preclude [him] *such juror* from rendering an impartial verdict *or from properly exercising the dis-*

cretion conferred upon such juror by law in the determination of a sentence pursuant to section 400.27.

§ 16. Section 270.30 of the criminal procedure law, as amended by chapter 100 of the laws of 1992, is amended to read as follows:

§ 270.30 Trial jury; alternate jurors.

1. Immediately after the last trial juror is sworn, the court may in its discretion direct the selection of one or more, but not more than six additional jurors to be known as "alternate jurors", *except that, in a prosecution under section 125.27 of the penal law, the court may, in its discretion, direct the selection of as many alternate jurors as the court determines to be appropriate.* Alternate jurors must be drawn in the same manner, must have the same qualifications, must be subject to the same examination and challenges for cause and must take the same oath as the regular jurors. After the jury has retired to deliberate, the court must either (1) with the consent of the defendant and the people, discharge the alternate jurors or (2) direct the alternate jurors not to discuss the case and must further direct that they be kept separate and apart from the regular jurors.

2. In any prosecution in which the people seek a sentence of death, the court shall not discharge the alternate jurors when the jury retires to deliberate upon its verdict and the alternate jurors, in the discretion of the court, may be continuously kept together under the supervision of an appropriate public servant or servants until such time as the jury returns its verdict. If the jury returns a verdict of guilty to a charge for which the death penalty may be imposed, the alternate jurors shall not be discharged and shall remain available for service

during any separate sentencing proceeding which may be conducted pursuant to section 400.27.

§ 17. The criminal procedure law is amended by adding a new section 270.55 to read as follows:

§ 270.55 Sentencing jury in capital cases.

During the period extending from when a jury returns a verdict of guilty upon a count of an indictment charging murder in the first degree as defined by section 125.27 of the penal law until a jury retires to deliberate on the sentence pursuant to section 400.27, the court may in its discretion either permit the jurors to separate during recesses and adjournments or direct that they be continuously kept together during such periods under the supervision of an appropriate public servant or servants. In the latter case, such public servant or servants may not speak to or communicate with any juror concerning any subject connected with the sentencing proceeding nor permit any other person to do so, and must return the jury to the court room at the next designated session. Unless otherwise provided for in section 400.27, the provisions of sections 270.35, 270.40 and 270.50 shall govern the sentencing proceeding provided for in section 400.27.

§ 18. The opening paragraph of subdivision 3 of section 300.40 of the criminal procedure law is amended to read as follows:

If a multiple count indictment contains concurrent counts *of murder in the first degree, the court must submit every such count. In any other case, if a multiple count indictment contains concurrent counts* only, the court must submit at least one such count, and may submit more than one as follows:

§ 19. Section 310.80 of the criminal procedure law is amended to read as follows:

§ 310.80 Recording and checking of verdict and polling of jury.

After a verdict has been rendered, it must be recorded on the minutes and read to the jury, and the jurors must be collectively asked whether such is their verdict. Even though no juror makes any declaration in the negative, the jury must, if either party makes such an application, be polled and each juror separately asked whether the verdict announced by the foreman is in all respects his verdict. If upon either the collective or the separate inquiry any juror answers in the negative, the court must refuse to accept the verdict and must direct the jury to resume its deliberation. If no disagreement is expressed, the jury must be discharged from the case, except as otherwise provided in [sections 125.30 and 125.35 of the penal law] *section 400.27.*

§ 20. The criminal procedure law is amended by adding a new section 400.27 to read as follows:

§ 400.27 Procedure for determining sentence upon conviction for the offense of murder in the first degree.

1. Upon the conviction of a defendant for the offense of murder in the first degree as defined by section 125.27 of the penal law, the court shall promptly conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or to life imprisonment without parole pursuant to subdivision five of section 70.00 of the penal law. Nothing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case, in which case the separate sentencing proceeding shall not be conducted and the court may

sentence such defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

2. The separate sentencing proceeding provided for by this section shall be conducted before the court sitting with the jury that found the defendant guilty. The court may discharge the jury and impanel another jury only in extraordinary circumstances and upon a showing of good cause, which may include, but is not limited to, a finding of prejudice to either party. If a new jury is impaneled, it shall be formed in accordance with the procedures in article two hundred seventy of this chapter. Before proceeding with the jury that found the defendant guilty, the court shall determine whether any juror has a state of mind that is likely to preclude the juror from rendering an impartial decision based upon the evidence adduced during the proceeding. In making such determination the court shall personally examine each juror individually outside the presence of the other jurors. The scope of the examination shall be within the discretion of the court and may include questions supplied by the parties as the court deems proper. The proceedings provided for in this subdivision shall be conducted on the record; provided, however, that upon motion of either party, and for good cause shown, the court may direct that all or a portion of the record of such proceedings be sealed. In the event the court determines that a juror has such a state of mind, the court shall discharge the juror and replace the juror with the alternate juror whose name was first drawn and called. If no alternate juror is available, the court must discharge the jury and impanel another jury in accordance with article two hundred seventy of this chapter.

3. For the purposes of a proceeding under this section each subparagraph of paragraph (a) of subdivision one of section 125.27 of the penal law shall be deemed to define an aggravating factor. Except as provided in subdivision seven of this section, at a sentencing proceeding pursuant to this section the only aggravating factors that the jury may consider are those proven beyond a reasonable doubt at trial, and no other aggravating factors may be considered. Whether a sentencing proceeding is conducted before the jury that found the defendant guilty or before another jury, the aggravating factor or factors proved at trial shall be deemed established beyond a reasonable doubt at the separate sentencing proceeding and shall not be relitigated. Where the jury is to determine sentences for concurrent counts of murder in the first degree, the aggravating factor included in each count shall be deemed to be an aggravating factor for the purpose of the jury's consideration in determining the sentence to be imposed on each such count.

4. The court on its own motion or on motion of either party, in the interest of justice or to avoid prejudice to either party, may delay the commencement of the separate sentencing proceeding.

5. Notwithstanding the provisions of article three hundred ninety of this chapter, where a defendant is found guilty of murder in the first degree, no presentence investigation shall be conducted; provided, however, that where the court is to impose a sentence of imprisonment, a presentence investigation shall be conducted and a presentence report shall be prepared in accordance with the provisions of such article.

6. At the sentencing proceeding the people shall not relitigate the existence of aggravating factors proved at the trial or otherwise present evidence, except, subject

to the rules governing admission of evidence in the trial of a criminal action, in rebuttal of the defendant's evidence. However, when the sentencing proceeding is conducted before a newly impaneled jury, the people may present evidence to the extent reasonably necessary to inform the jury of the nature and circumstances of the count or counts of murder in the first degree for which the defendant was convicted in sufficient detail to permit the jury to determine the weight to be accorded the aggravating factor or factors established at trial. Whenever the people present such evidence, the court must instruct the jury in its charge that any facts elicited by the people that are not essential to the verdict of guilty on such count or counts shall not be deemed established beyond a reasonable doubt. Subject to the rules governing the admission of evidence in the trial of a criminal action, the defendant may present any evidence relevant to any mitigating factor set forth in subdivision nine of this section; provided, however, the defendant shall not be precluded from the admission of reliable hearsay evidence. The burden of establishing any of the mitigating factors set forth in subdivision nine of this section shall be on the defendant, and must be proven by a preponderance of the evidence. The people shall not offer evidence or argument relating to any mitigating factor except in rebuttal of evidence offered by the defendant.

7. (a) The people may present evidence at the sentencing proceeding, to the extent such evidence could not have been presented by the people at trial, to prove that the crime of murder in the first degree for which the defendant was convicted was committed in furtherance of and after substantial planning and premeditation to commit an act of terrorism. For purposes of this section, "terrorism" means activities that involve a violent act or

acts dangerous to human life that are in violation of the criminal laws of this state and are intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by murder, assassination or kidnapping. The defendant's commission of the crime of murder in the first degree through an act of terrorism, shall, if proven at the sentencing proceeding, constitute an aggravating factor.

(b) The people may present evidence at the sentencing proceeding to prove that in the ten year period prior to the commission of the crime of murder in the first degree for which the defendant was convicted, the defendant has previously been convicted of two or more offenses committed on different occasions; provided, that each such offense shall be either (i) a class A felony offense other than one defined in article two hundred twenty of the penal law, a class B violent felony offense specified in paragraph (a) of subdivision one of section 70.02 of the penal law, or a felony offense under the penal law a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death, or (ii) an offense under the laws of another state or of the United States punishable by a term of imprisonment of more than one year a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death. For the purpose of this paragraph, the term "deadly weapon" shall have the meaning set forth in subdivision twelve of section 10.00 of the penal law. In calculating the ten year period under this paragraph, any period of time during which the defendant was

incarcerated for any reason between the time of commission of any of the prior felony offenses and the time of commission of the crime of murder in the first degree shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration. The defendant's conviction of two or more such offenses shall, if proven at the sentencing proceeding, constitute an aggravating factor.

(c) In order to be deemed established, an aggravating factor set forth in this subdivision must be proven by the people beyond a reasonable doubt and the jury must unanimously find such factor to have been so proven. The defendant may present evidence relating to an aggravating factor defined in this subdivision and either party may offer evidence in rebuttal. Any evidence presented by either party relating to such factor shall be subject to the rules governing admission of evidence in the trial of a criminal action.

(d) Whenever the people intend to offer evidence of an aggravating factor set forth in this subdivision, the people must within a reasonable time prior to trial file with the court and serve upon the defendant a notice of intention to offer such evidence. Whenever the people intend to offer evidence of the aggravating factor set forth in paragraph (b) of this subdivision, the people shall file with the notice of intention to offer such evidence a statement setting forth the date and place of each of the alleged offenses in paragraph (b) of this subdivision. The provisions of section 400.15 of this chapter, except for subdivisions one and two thereof, shall be followed.

8. Consistent with the provisions of this section, the people and the defendant shall be given fair opportunity to rebut any evidence received at the separate sentencing proceeding.

9. Mitigating factors shall include the following:

(a) The defendant has no significant history of prior criminal convictions involving the use of violence against another person;

(b) The defendant was mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of law was impaired but not so impaired in either case as to constitute a defense to prosecution;

(c) The defendant was under duress or under the domination of another person, although not such duress or domination as to constitute a defense to prosecution;

(d) The defendant was criminally liable for the present offense of murder committed by another, but his participation in the offense was relatively minor although not so minor as to constitute a defense to prosecution;

(e) The murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution; or

(f) Any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime.

10. At the conclusion of all the evidence, the people and the defendant may present argument in summation for or against the sentence sought by the people. The people may deliver the first summation and the defendant may then deliver the last summation. Thereafter, the court shall deliver a charge to the jury on any matters appropriate in the circumstances. In its charge, the court

must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed, and that the jury must be unanimous with respect to either sentence. The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life. Following the court's charge, the jury shall retire to consider the sentence to be imposed. Unless inconsistent with the provisions of this section, the provisions of sections 310.10, 310.20 and 310.30 shall govern the deliberations of the jury.

11. (a) The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed. Any member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established.

(b) If the jury directs imposition of either a sentence of death or life imprisonment without parole, it shall specify on the record those mitigating and aggravating factors considered and those mitigating factors established by the defendant, if any.

(c) With respect to a count or concurrent counts of murder in the first degree, the court may direct the jury

to cease deliberation with respect to the sentence or sentences to be imposed if the jury has deliberated for an extensive period of time without reaching unanimous agreement on the sentence or sentences to be imposed and the court is satisfied that any such agreement is unlikely within a reasonable time. The provisions of this paragraph shall apply with respect to consecutive counts of murder in the first degree. In the event the jury is unable to reach unanimous agreement, the court must sentence the defendant in accordance with subdivisions one through three of section 70.00 of the penal law with respect to any count or counts of murder in the first degree upon which the jury failed to reach unanimous agreement as to the sentence to be imposed.

(d) If the jury unanimously determines that a sentence of death should be imposed, the court must thereupon impose a sentence of death. Thereafter, however, the court may, upon written motion of the defendant, set aside the sentence of death upon any of the grounds set forth in section 330.30. The procedures set forth in sections 330.40 and 330.50, as applied to separate sentencing proceedings under this section, shall govern the motion and the court upon granting the motion shall, except as may otherwise be required by subdivision one of section 330.50, direct a new sentencing proceeding pursuant to this section. Upon granting the motion upon any of the grounds set forth in section 330.30 and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

(e) If the jury unanimously determines that a sentence of life imprisonment without parole should be imposed the court must thereupon impose a sentence of life imprisonment without parole.

(f) Where a sentence has been unanimously determined by the jury it must be recorded on the minutes and read to the jury, and the jurors must be collectively asked whether such is their sentence. Even though no juror makes any declaration in the negative, the jury must, if either party makes such an application, be polled and each juror separately asked whether the sentence announced by the foreman is in all respects his or her sentence. If, upon either the collective or the separate inquiry, any juror answers in the negative, the court must refuse to accept the sentence and must direct the jury to resume its deliberation. If no disagreement is expressed, the jury must be discharged from the case.

12. (a) Upon the conviction of a defendant for the offense of murder in the first degree as defined in section 125.27 of the penal law, the court shall, upon oral or written motion of the defendant based upon a showing that there is reasonable cause to believe that the defendant is mentally retarded, promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. Upon the consent of both parties, such a hearing, or a portion thereof, may be conducted by the court contemporaneously with the separate sentencing proceeding in the presence of the sentencing jury, which in no event shall be the trier of fact with respect to the hearing. At such hearing the defendant has the burden of proof by a preponderance of the evidence that he or she is mentally retarded. The court shall defer rendering any finding pursuant to this subdivision as to

whether the defendant is mentally retarded until a sentence is imposed pursuant to this section.

(b) In the event the defendant is sentenced pursuant to this section to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole, the court shall not render a finding with respect to whether the defendant is mentally retarded.

(c) In the event the defendant is sentenced pursuant to this section to death, the court shall thereupon render a finding with respect to whether the defendant is mentally retarded. If the court finds the defendant is mentally retarded, the court shall set aside the sentence of death and sentence the defendant either to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. If the court finds the defendant is not mentally retarded, then such sentence of death shall not be set aside pursuant to this subdivision.

(d) In the event that a defendant is convicted of murder in the first degree pursuant to subparagraph (iii) of paragraph (a) of subdivision one of section 125.27 of the penal law, and the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution, and a sentence of death is imposed, such sentence may not be set aside pursuant to this subdivision upon the ground that the defendant is mentally retarded. Nothing in this paragraph or paragraph (a) of this subdivision shall preclude a defendant from presenting mitigating evidence of mental retardation at the separate sentencing proceeding.

(e) The foregoing provisions of this subdivision notwithstanding, at a reasonable time prior to the commencement of trial the defendant may, upon a written motion alleging reasonable cause to believe the defendant is mentally retarded, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant is mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. In the event the court finds after the hearing that the defendant is not mentally retarded, the court must, prior to commencement of trial, enter an order so stating, but nothing in this paragraph shall preclude a defendant from presenting mitigating evidence of mental retardation at a separate sentencing proceeding. In the event the court finds after the hearing that the defendant, based upon a preponderance of the evidence, is mentally retarded, the court must, prior to commencement of trial, enter an order so stating. Unless the order is reversed on an appeal by the people or unless the provisions of paragraph (d) of this subdivision apply, a separate sentencing proceeding under this section shall not be conducted if the defendant is thereafter convicted of murder in the first degree. In the event a separate sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime of murder in the first degree, shall sentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. Whenever a mental retardation hearing is held and a finding is rendered pursuant to this paragraph, the court may not conduct a hearing pursuant to paragraph (a) of this

subdivision. For purposes of this subdivision and paragraph (b) of subdivision nine of this section, "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen.

(f) In the event the court enters an order pursuant to paragraph (e) of this subdivision finding that the defendant is mentally retarded, the people may appeal as of right from the order pursuant to subdivision ten of section 450.20 of this chapter. Upon entering such an order the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order finding that the defendant is mentally retarded. The taking of an appeal by the people stays the effectiveness of the court's order and any order fixing a date for trial. Within six months of the effective date of this subdivision, the court of appeals shall adopt rules to ensure that appeals pursuant to this paragraph are expeditiously perfected, reviewed and determined so that pretrial delays are minimized. Prior to adoption of the rules, the court of appeals shall issue proposed rules and receive written comments thereon from interested parties.

13. (a) As used in this subdivision, the term "psychiatric evidence" means evidence of mental disease, defect or condition in connection with either a mitigating factor defined in this section or a mental retardation hearing pursuant to this section to be offered by a psychiatrist, psychologist or other person who has received training, or education, or has experience relating to the identification, diagnosis, treatment or evaluation of mental disease, mental defect or mental condition.

(b) When either party intends to offer psychiatric evidence, the party must, within a reasonable time prior to trial, serve upon the other party and file with the court a written notice of intention to present psychiatric evidence. The notice shall include a brief but detailed statement specifying the witness, nature and type of psychiatric evidence sought to be introduced. If either party fails to serve and file written notice, no psychiatric evidence is admissible unless the party failing to file thereafter serves and files such notice and the court affords the other party an adjournment for a reasonable period. If a party fails to give timely notice, the court in its discretion may impose upon offending counsel a reasonable monetary sanction for an intentional failure but may not in any event preclude the psychiatric evidence. In the event a monetary sanction is imposed, the offending counsel shall be personally liable therefor, and shall not receive reimbursement of any kind from any source in order to pay the cost of such monetary sanction. Nothing contained herein shall preclude the court from entering an order directing a party to provide timely notice.

(c) When a defendant serves notice pursuant to this subdivision, the district attorney may make application, upon notice to the defendant, for an order directing that the defendant submit to an examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker designated by the district attorney, for the purpose of rebutting evidence offered by the defendant with respect to a mental disease, defect, or condition in connection with either a mitigating factor defined in this section, including whether the defendant was acting under duress, was mentally or emotionally disturbed or mentally retarded, or was under the influence of alcohol or any drug. If the application is granted, the district attorney shall schedule a time and place for the exami-

nation, which shall be recorded. Counsel for the people and the defendant shall have the right to be present at the examination. A transcript of the examination shall be made available to the defendant and the district attorney promptly after its conclusion. The district attorney shall promptly serve on the defendant a written copy of the findings and evaluation of the examiner. If the court finds that the defendant has wilfully refused to cooperate fully in an examination pursuant to this paragraph, it shall, upon request of the district attorney, instruct the jury that the defendant did not submit to or cooperate fully in such psychiatric examination. When a defendant is subjected to an examination pursuant to an order issued in accordance with this subdivision, any statement made by the defendant for the purpose of the examination shall be inadmissible in evidence against him in any criminal action or proceeding on any issue other than that of whether a mitigating factor has been established or whether the defendant is mentally retarded, but such statement is admissible upon such an issue whether or not it would otherwise be deemed a privileged communication.

14. (a) At a reasonable time prior to the sentencing proceeding or a mental retardation hearing:

(i) the prosecutor shall, unless previously disclosed and subject to a protective order, make available to the defendant the statements and information specified in subdivision one of section 240.45 and make available for inspection, photographing, copying or testing the property specified in subdivision one of section 240.20; and

(ii) the defendant shall, unless previously disclosed and subject to a protective order, make available to the prosecution the statements and information specified in subdivision two of section 240.45 and make available for

inspection, photographing, copying or testing, subject to constitutional limitations, the reports, documents and other property specified in subdivision one of section 240.30.

(b) Where a party refuses to make disclosure pursuant to this section, the provisions of section 240.35, subdivision one of section 240.40 and section 240.50 shall apply.

(c) If, after complying with the provisions of this section or an order pursuant thereto, a party finds either before or during a sentencing proceeding or mental retardation hearing, additional material subject to discovery or covered by court order, the party shall promptly make disclosure or apply for a protective order.

(d) If the court finds that a party has failed to comply with any of the provisions of this section, the court may enter any of the orders specified in subdivision one of section 240.70.

15. The court of appeals shall formulate and adopt rules for the development of forms for use by the jury in recording its findings and determinations of sentence.

§ 21. Subdivision 1 of section 440.20 of the criminal procedure law is amended to read as follows:

1. At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law. *Where the judgment includes a sentence of death, the court may also set aside the sentence upon any of the grounds set forth in paragraph (b), (c), (f), (g) or (h) of subdivision one of section 440.10 as applied to a separate sentencing proceeding under sec-*

tion 400.27, provided, however, that to the extent the ground or grounds asserted include one or more of the aforesaid paragraphs of subdivision one of section 440.10, the court must also apply subdivisions two and three of section 440.10, other than paragraph (d) of subdivision two of such section, in determining the motion. In the event the court enters an order granting a motion to set aside a sentence of death under this section, the court must either direct a new sentencing proceeding in accordance with section 400.27 or, to the extent that the defendant cannot be resentenced to death consistent with the laws of this state or the constitution of this state or of the United States, resentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. Upon granting the motion upon any of the grounds set forth in the aforesaid paragraphs of subdivision one of section 440.10 and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

§ 22. Section 450.20 of the criminal procedure law is amended by adding a new subdivision 10 to read as follows:

10. An order, entered pursuant to paragraph (e) of subdivision twelve of section 400.27, finding that the defendant is mentally retarded.

§ 23. Subdivision 3 of section 450.70 of the criminal procedure law is amended and a new subdivision 4 is added to read as follows:

3. An order denying a motion, made pursuant to section 440.20, to set aside a sentence of death[.]*;*

4. An order denying a motion, made pursuant to paragraph (d) of subdivision eleven of section 400.27, to set aside a sentence of death.

§ 24. Section 450.80 of the criminal procedure law is amended to read as follows:

§ 450.80 Appeal by people directly to court of appeals; in what cases authorized.

An appeal directly to the court of appeals may be taken as of right by the people from the following orders of a superior court:

1. An order, entered pursuant to section 440.10, vacating a judgment including a sentence of death;

2. An order, entered pursuant to section 440.20, setting aside a sentence of death[.]*;*

3. An order, entered pursuant to paragraph (d) of subdivision eleven of section 400.27, setting aside a sentence of death;

4. An order, entered pursuant to subdivision twelve of section 400.27, setting aside a sentence of death.

§ 25. Subdivision 2 of section 460.40 of the criminal procedure law, as added by chapter 209 of the laws of 1990, is amended to read as follows:

2. The taking of an appeal by the people to an intermediate appellate court pursuant to subdivision one-a of section 450.20, from an order reducing a count or counts

of an indictment or dismissing an indictment and directing the filing of a prosecutor's information, stays the effect of such order. *In addition, the taking of an appeal by the people to an intermediate appellate court pursuant to subdivision one of section 450.20, from an order dismissing a count or counts of an indictment charging murder in the first degree, stays the effect of such order.*

§ 26. Section 460.40 of the criminal procedure law is amended by adding a new subdivision 3 to read as follows:

3. Within six months of the effective date of this subdivision, the court of appeals shall adopt rules to ensure that a defendant is granted a stay of the execution of any death warrant issued pursuant to article twenty-two-B of the correction law to allow the defendant an opportunity to prepare and timely file an initial motion pursuant to section 440.10 or 440.20 seeking to set aside a sentence of death or vacate a judgment including a sentence of death and to allow the motion and any appeal from the denial thereof to be timely determined. The rules shall provide that in the event a defendant seeks to file any subsequent motion with respect to the judgment or sentence following a final determination of the defendant's initial motion pursuant to section 440.10 or 440.20, a motion for a stay of the execution of the death warrant may only be granted for good cause shown. The people and the defendant shall have a right to appeal to the court of appeals from orders granting or denying such stay motions and any rules adopted pursuant to this subdivision shall provide that the court of appeals may affirm such orders, reverse them or modify them upon such terms as the court deems appropriate and shall provide for the expeditious perfection and determination of such appeals. Prior to adoption of the rules, the court of

appeals shall issue proposed rules and receive written comments thereon from interested parties.

§ 27. Section 470.30 of the criminal procedure law is amended to read as follows:

§ 470.30 Determination by court of appeals of appeals taken directly thereto from judgments and orders of criminal courts.

1. Wherever appropriate, the rules set forth in sections 470.15 and 470.20, governing the consideration and determination by intermediate appellate courts of appeals thereto from judgments and orders of criminal courts, and prescribing their scope of review and the corrective action to be taken by them upon reversal or modification, apply equally to the consideration and determination by the court of appeals of appeals taken directly thereto, pursuant to sections 450.70 and 450.80, from judgments and orders of superior criminal courts[; except that the court of appeals may not as a matter of discretion in the interest of justice set aside, reduce or change a sentence of death as being unduly harsh or severe.

2. Upon affirming a judgment including a sentence of death, the court of appeals, by an order signed by a majority of the judges thereof, must fix the week during which such sentence of death is to be executed, and the sentence must be executed according to law. The entry of an order granting a motion for reargument of such an appeal, however, stays the execution of the judgment. If the judgment is thereafter reaffirmed a new execution date must be fixed by the court].

2. Whenever a sentence of death is imposed, the judgment and sentence shall be reviewed on the record by the court of appeals. Review by the court of appeals pur-

suant to subdivision one of section 450.70 may not be waived.

3. With regard to the sentence, the court shall, in addition to exercising the powers and scope of review granted under subdivision one of this section, determine:

(a) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary or legally impermissible factor including whether the imposition of the verdict or sentence was based upon the race of the defendant or a victim of the crime for which the defendant was convicted;

(b) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. In conducting such review the court, upon request of the defendant, in addition to any other determination, shall review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim of the crime for which the defendant was convicted; and

(c) whether the decision to impose the sentence of death was against the weight of the evidence.

4. The court shall include in its decision: (a) the aggravating and mitigating factors established in the record on appeal; and (b) those similar cases it took into consideration.

5. In addition to exercising any other corrective action pursuant to subdivision one of this section, the court, with regard to review of a sentence of death, shall be authorized to:

(a) affirm the sentence of death; or

(b) set the sentence aside and remand the case for resentencing pursuant to the procedures set forth in section 400.27 for a determination as to whether the defendant shall be sentenced to death, life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole; or

(c) set the sentence aside and remand the case for resentencing by the court for a determination as to whether the defendant shall be sentenced to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

§ 28. Paragraph (b) of subdivision 8 of section 700.05 of the criminal procedure law, as amended by chapter 490 of the laws of 1992, is amended to read as follows:

(b) Any of the following felonies: assault in the second degree as defined in section 120.05 of the penal law, assault in the first degree as defined in section 120.10 of the penal law, reckless endangerment in the first degree as defined in section 120.25 of the penal law, promoting a suicide attempt as defined in section 120.30 of the penal law, criminally negligent homicide as defined in section 125.10 of the penal law, manslaughter in the second degree as defined in section 125.15 of the penal law, manslaughter in the first degree as defined in section 125.20 of the penal law, murder *in the second degree* as defined in section 125.25 of the penal law, *murder in the first degree as defined in section 125.27 of the penal law,* abortion in the second degree as defined in section 125.40 of the penal law, abortion in the first degree as defined in section 125.45 of the penal law, rape in the third degree as defined in section 130.25 of the penal law, rape in the second degree as defined in section

130.30 of the penal law, rape in the first degree as defined in section 130.35 of the penal law, sodomy in the third degree as defined in section 130.40 of the penal law, sodomy in the second degree as defined in section 130.45 of the penal law, sodomy in the first degree as defined in section 130.50 of the penal law, sexual abuse in the first degree as defined in section 130.65 of the penal law, unlawful imprisonment in the first degree as defined in section 135.10 of the penal law, kidnapping in the second degree as defined in section 135.20 of the penal law, kidnapping in the first degree as defined in section 135.25 of the penal law, custodial interference in the first degree as defined in section 135.50 of the penal law, coercion in the first degree as defined in section 135.65 of the penal law, criminal trespass in the first degree as defined in section 140.17 of the penal law, burglary in the third degree as defined in section 140.20 of the penal law, burglary in the second degree as defined in section 140.25 of the penal law, burglary in the first degree as defined in section 140.30 of the penal law, criminal mischief in the third degree as defined in section 145.05 of the penal law, criminal mischief in the second degree as defined in section 145.10 of the penal law, criminal mischief in the first degree as defined in section 145.12 of the penal law, criminal tampering in the first degree as defined in section 145.20 of the penal law, arson in the fourth degree as defined in section 150.05 of the penal law, arson in the third degree as defined in section 150.10 of the penal law, arson in the second degree as defined in section 150.15 of the penal law, arson in the first degree as defined in section 150.20 of the penal law, grand larceny in the fourth degree as defined in section 155.30 of the penal law, grand larceny in the third degree as defined in section 155.35 of the penal law, grand larceny in the second degree as defined

in section 155.40 of the penal law, grand larceny in the first degree as defined in section 155.42 of the penal law, robbery in the third degree as defined in section 160.05 of the penal law, robbery in the second degree as defined in section 160.10 of the penal law, robbery in the first degree as defined in section 160.15 of the penal law, unlawful use of secret scientific material as defined in section 165.07 of the penal law, criminal possession of stolen property in the fourth degree as defined in section 165.45 of the penal law, criminal possession of stolen property in the third degree as defined in section 165.50 of the penal law, criminal possession of stolen property in the second degree as defined by section 165.52 of the penal law, criminal possession of stolen property in the first degree as defined by section 165.54 of the penal law, trademark counterfeiting in the first degree as defined in section 165.73 of the penal law, forgery in the second degree as defined in section 170.10 of the penal law, forgery in the first degree as defined in section 170.15 of the penal law, criminal possession of a forged instrument in the second degree as defined in section 170.25 of the penal law, criminal possession of a forged instrument in the first degree as defined in section 170.30 of the penal law, criminal possession of forgery devices as defined in section 170.40 of the penal law, falsifying business records in the first degree as defined in section 175.10 of the penal law, tampering with public records in the first degree as defined in section 175.25 of the penal law, offering a false instrument for filing in the first degree as defined in section 175.35 of the penal law, issuing a false certificate as defined in section 175.40 of the penal law, escape in the second degree as defined in section 205.10 of the penal law, escape in the first degree as defined in section 205.15 of the penal law, absconding from [work] *temporary* release

in the first degree as defined in section 205.17 of the penal law, promoting prison contraband in the first degree as defined in section 205.25 of the penal law, hindering prosecution in the second degree as defined in section 205.60 of the penal law, hindering prosecution in the first degree as defined in section 205.65 of the penal law, criminal possession of a weapon in the third degree as defined in subdivisions two, three, four and five of section 265.02 of the penal law, criminal possession of a weapon in the second degree as defined in section 265.03 of the penal law, criminal possession of a dangerous weapon in the first degree as defined in section 265.04 of the penal law, manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances defined as felonies in subdivisions one, two, and three of section 265.10 of the penal law, sections 265.11, 265.12 and 265.13 of the penal law, or prohibited use of weapons as defined in subdivision two of section 265.35 of the penal law, relating to firearms and other dangerous weapons;

§ 29. The judiciary law is amended by adding a new section 35-b to read as follows:

§ 35-b. Assignment of counsel and related services in criminal actions in which a death sentence may be imposed. 1. Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with murder in the first degree as defined in section 125.27 of the penal law, or in any criminal action in which a defendant is charged with murder in the second degree as defined in section 125.25 of the penal law and the district attorney confirms upon inquiry by the court that the district attorney is undertaking an investigation to determine whether the defendant can or should be charged with murder in the first

degree as defined in section 125.27 of the penal law and the court determines that there is a reasonable likelihood the defendant will be so charged, if the defendant is or becomes financially unable to obtain adequate representation or investigative, expert or other reasonably necessary services at any time either (a) prior to judgment, or (b) after the entry of a judgment imposing a sentence of death but before final resolution of a direct appeal pursuant to subdivision one of section 450.70 of the criminal procedure law and of an appeal pursuant to subdivision two or three of section 450.70 of the criminal procedure law from an order denying an initial post judgment motion pursuant to section 440.10 or 440.20 of the criminal procedure law, the defendant shall be entitled to the appointment of counsel and investigative, expert and such other reasonably necessary services in accordance with the provisions of this section. Prior to the appointment of counsel pursuant to this section, the court shall determine whether the defendant is or has become financially unable to obtain adequate representation. In the event such defendant seeks to file any subsequent motion, he or she shall not be eligible for the appointment of counsel pursuant to this section.

2. The appointment of counsel shall be made by the trial court if made prior to the entry of a judgment including a sentence of death or by the court of appeals, except as otherwise provided in this subdivision, if made after the entry of a judgment including a sentence of death. With respect to counsel at trial and at a separate sentencing proceeding, the court shall appoint two attorneys, one to be designated "lead" counsel and the other to be designated "associate" counsel. The appointment of any such counsel shall be made from a list of four proposed teams of qualified lead and associate counsel provided to the appropriate court by the capital defender

office. Alternatively, the court may, with the consent of the capital defender office, appoint the office to represent the defendant. At least one of the proposed teams of qualified lead and associate counsel on any list submitted pursuant to this subdivision shall regularly practice within the judicial department in which the defendant has been charged. With respect to a jurisdiction in which the capital defender office has entered into an agreement to provide representation with a legal aid society, office of public defender or other not-for-profit organization providing criminal defense services, the capital defender office may designate the society, public defender or organization for appointment as counsel pursuant to this section and need not submit a list of four proposed teams of qualified lead and associate counsel for appointment. In the event that counsel is not appointed pursuant to the foregoing provisions of this subdivision, the court may appoint any attorney whose name appears on a roster established pursuant to subdivision five of this section for appointment as lead or associate counsel. In the event no such attorney is available, the court may appoint an attorney eligible for appointment pursuant to article eighteen-B of the county law who is competent to represent defendants charged with murder and other serious felonies. With respect to an appeal from a judgment including a sentence of death, the court of appeals shall assign lead counsel only, but for good cause shown, the court may assign associate counsel. With respect to an initial motion pursuant to section 440.10 or 440.20 of the criminal procedure law, and any appeal therefrom, the appropriate court shall assign lead counsel only. The trial court shall assign counsel in connection with such a motion and the court of appeals shall assign counsel in connection with any appeal therefrom.

3. There is hereby created a capital defender office, to be governed by a three member board of directors. No attorney who is employed as a judge, prosecutor or in a law enforcement capacity shall be eligible to serve on such board. The board members shall be appointed in the following manner: one member shall be appointed by the chief judge of the court of appeals, one member shall be appointed by the temporary president of the senate and one member shall be appointed by the speaker of the assembly. Each member shall be appointed to serve a three year term and vacancies shall be filled in the same manner as the original appointment. Members of the board shall receive no compensation but shall be reimbursed all reasonable and necessary expenses incidental to their duties.

4. Within the amounts appropriated therefor:

(a) The board of directors shall have the authority to appoint a capital defender, who shall have the authority in consultation with the board of directors to hire attorneys as deputy capital defenders, investigators and such other staff as the capital defender and the board of directors deem necessary to effectuate the purposes of the capital defender office.

(b) The capital defender office shall be authorized as follows:

(i) Upon appointment in accordance with the provisions of this section, to act as counsel for defendants and to furnish such investigative, expert and other reasonably necessary services as the capital defender deems appropriate;

(ii) To provide legal or other advice or, to the extent not otherwise available, any other assistance to counsel appointed pursuant to this section;

(iii) To provide investigative, expert or other reasonably necessary services to defendants charged with murder in the first degree who are not represented by the capital defender office, provided that such defendants (A) are or have become financially unable to obtain adequate investigative, expert or other reasonably necessary services and are represented by counsel appointed pursuant to this section, and (B) have obtained pursuant to this section the approval of a trial court for the same investigative, expert or other reasonably necessary services, provided, however, that such defendants have not received such services from other sources;

(iv) To determine, in consultation with the administrative board of the judicial conference, proposed minimum standards for lead and associate counsel in capital cases. In determining the minimum standards, the capital defender office in consultation with the administrative board of the judicial conference shall consider among other factors both the needs of the state for an adequate number of attorneys to represent defendants in capital cases and the needs of defendants in capital cases for competent counsel. The minimum standards, and any modifications thereto which the capital defender office in consultation with the administrative board of the judicial conference may from time to time propose, shall be submitted for approval to the court of appeals. Prior to approving the minimum standards and any modifications thereto the court shall invite the submission of written comments from interested parties;

(v) To provide continuing legal education, training, advice and assistance to attorneys representing or seeking to represent defendants in capital cases; and

(vi) To enter into an agreement with a legal aid society, office of public defender or other not-for-profit

organization providing criminal defense services to designate and provide counsel pursuant to this section. Any agreement shall require that the society, public defender or organization effectuate the purposes and provisions of this section and may be terminated by the capital defender office by serving notice on the society, public defender or organization sixty days prior to the effective date of termination. Upon the termination of any agreement, the representation provided by the society, public defender or organization shall continue until the proceeding is concluded or the court relieves the society, public defender or organization and appoints successor counsel pursuant to this section. The capital defender office may require such reports as it deems necessary in connection with such agreement and shall monitor compliance with its terms. A society, public defender or organization which enters into an agreement pursuant to this section shall not be the exclusive provider of counsel within such society's, public defender's or organization's jurisdiction. In the event that a defendant is not represented by such a society, public defender or organization due to a conflict, counsel shall be appointed in accordance with the provisions of subdivision two of this section.

5. (a) A screening panel shall be established in each judicial department consisting of four members, two of whom shall be appointed by the board of directors of the capital defender office and two of whom shall be appointed by the presiding justice of each judicial department. Each screening panel shall establish and periodically update a roster of attorneys qualified for appointment as lead counsel or associate counsel pursuant to the provisions of this section. The capital defender office, in consultation with the administrative board of the judicial conference, shall promulgate reg-

ulations to provide that qualified attorneys whose names appear on such rosters and who wish to be appointed to represent defendants in capital cases, are given fair opportunity to receive such appointments. Each screening panel shall also promulgate and periodically update, in consultation with the administrative board of the judicial conference, a schedule of fees to be paid attorneys pursuant to this section in each department, which schedule shall be subject to the approval of the court of appeals. Prior to approving fee schedules, the court shall invite the submission of written comments from interested parties. Fee schedules shall be promulgated and approved after reviewing the rates of compensation generally paid in the department to attorneys with substantial experience in the representation of defendants charged with murder or other serious felonies, and shall be adequate to ensure that qualified attorneys are available to represent defendants eligible to receive counsel pursuant to this section.

(b) Each appellate division, in consultation with the screening panel, shall establish the rates of fees and expenses to be paid for expert, investigative and other reasonably necessary services pursuant to this section.

6. (a) When a defendant has been charged in an accusatory instrument with murder in the first degree as defined in section 125.27 of the penal law or with murder in the second degree as defined in section 125.25 of the penal law, the district attorney shall notify the capital defender office.

(b) The clerk of the superior court wherein a judgment that includes a sentence of death has been entered and the clerk of the court of appeals upon an order affirming a judgment that includes a sentence of death shall notify the capital defender office of the judgment or order.

Notice need not be given when the defendant has retained counsel of his or her own choosing or when appellate or post-conviction counsel has already been appointed pursuant to this section and when counsel advises that he or she will continue to act on the defendant's behalf.

(c) Notice to the capital defender office required pursuant to paragraph (a) or (b) of this subdivision shall consist of telephone, facsimile, E-mail or other prompt electronic means of notification forthwith, which shall be followed by first class mail notification within two business days of the charge, sentence or affirmance. The failure to give notice shall not affect the validity of any indictment, conviction, judgment or order.

7. Whenever a defendant is charged with murder in the first degree, or a defendant has been charged with murder in the second degree as defined in section 125.25 of the penal law and the court determines after confirmation by the district attorney pursuant to subdivision one of this section that there is a reasonable likelihood the defendant will be charged with murder in the first degree and the defendant is financially unable to obtain counsel as determined by the court and an attorney has not yet been appointed to represent such defendant pursuant to the provisions of this section, the capital defender office may provide or arrange to provide temporary legal representation to the defendant. No arraignment shall be delayed on account of any representation to be provided or arranged pursuant to this subdivision. Any temporary representation provided pursuant to this subdivision shall cease upon the court's appointment of an attorney pursuant to this section.

8. Whenever prior to entry of judgment a defendant is charged with murder in the first degree, or a defendant

has been charged with murder in the second degree as defined in section 125.25 of the penal law and the court determines after confirmation by the district attorney pursuant to subdivision one of this section that there is a reasonable likelihood the defendant will be charged with murder in the first degree, and the defendant is or becomes financially unable, as determined by the court, to obtain adequate investigative, expert or other reasonably necessary services and the court has not appointed the capital defender office to represent the defendant, the trial court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment of reasonable fees and expenses therefor; provided, however, that the court shall first find in an ex parte proceeding that such investigative, expert or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentencing. Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision and payment for such services nunc pro tunc. Whenever a court disapproves, in whole or in part, a request for authorization or voucher, the defendant may apply to a justice of an intermediate appellate court for an order approving the request or voucher.

9. Any compensation, fee or expense to be paid pursuant to this section shall be a state charge payable on vouchers approved by the court which fixed the same, after audit by and on the warrant of the comptroller. Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source. With respect to

compensation to be paid to counsel pursuant to this section, the appropriate court shall review and determine the reasonableness of the number of hours expended out of court.

10. Whenever it appears that a defendant is financially able to obtain adequate representation or investigative, expert or other such services, or to make partial payment for such representation or other services, counsel shall inform the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the capital defender office or the state.

11. The provisions of this section shall cease to apply on the tenth day, or such later day as the court may determine to be reasonably necessary to provide for successor counsel if prior counsel is to be relieved, following the entry of either a final judgment or order not subject to further review by an appellate court, or a prosecutorial determination, which necessarily precludes an imposition of a sentence of death, whereupon the provisions of article eighteen-A or article eighteen-B of the county law shall be applicable.

12. Nothing in this section shall be construed to authorize the appointment of counsel, investigative, expert or other services or the provision of assistance, other than continuing legal education, training and advice, with respect to the filing, litigation, or appeal of a petition for a writ of habeas corpus in any federal court; nor shall anything in this section be construed to authorize the appointment of attorneys, investigative, expert or other services in connection with any proceedings other than trials, including separate sentencing proceedings, of defendants charged with murder in the first degree, appeals from judgments including a sen-

tence of death, and initial motions pursuant to section 440.10 or 440.20 of the criminal procedure law and any appeals therefrom.

§ 30. The judiciary law is amended by adding a new section 211-a to read as follows:

§ 211-a. Required reports in capital cases. The court of appeals shall promulgate rules to ensure that in every criminal action in which a defendant is indicted for the commission of an offense defined in section 125.27 of the penal law, the clerk of the trial court shall prepare a data report as provided by this section not later than forty-five days following the disposition of the case by the trial court; provided, however, that if the indictment is dismissed, no such data report shall be required. The data reports shall be in a form determined by the court of appeals. Data reports shall be prepared by the clerk of the trial court by reviewing the record and upon consultation with the prosecutor and the attorney for the defendant and after completion shall be forwarded to the clerk of the court of appeals. The form and the content of the report shall be consistent with the purpose of assisting the court of appeals in determining pursuant to section 470.30 of the criminal procedure law, whether a particular sentence of death is disproportionate or excessive in the context of penalties imposed in similar cases, considering both the crime or crimes and the defendant. Data reports developed pursuant to this section shall be compiled into a single uniform capital case data report, which shall be available for use by appellants in capital cases in accordance with disclosure rules promulgated by the court of appeals.

§ 31. The county law is amended by adding a new section 707 to read as follows:

§ 707. Payments of expert fees in criminal cases in which the death penalty may be imposed. 1. Notwithstanding any other provision of law to the contrary, upon a finding in an ex parte proceeding that expert services are reasonably necessary for the prosecution of the case whether in connection with issues relating to guilt or sentencing or that investigative services relating to a separate sentencing proceeding or mental retardation hearing pursuant to section 400.27 of the criminal procedure law are reasonably necessary, the trial court shall authorize the payment of fees and expenses for such services. Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision and payment for such services nunc pro tunc.

2. Each appellate division shall establish the rates of fees and expenses to be paid for expert and investigative services pursuant to subdivision one of this section.

3. Any fee or expense to be paid pursuant to this section shall be a state charge payable on vouchers approved by the court which fixed the same after audit by and on the warrant of the comptroller.

4. Whenever a court disapproves, in whole or in part, a request for authorization or voucher, the district attorney may apply to a justice of an intermediate appellate court for an order approving the request or voucher.

§ 32. Article 22-B of the correction law is REPEALED and a new article 22-B is added to read as follows:

ARTICLE 22-B

THE DEATH PENALTY

Section 650. Warrant for execution of death sentence.

651. Time of execution.

652. Delivery of warrant and confinement.

653. Transmittal of record to the governor.

654. Governor may consult.

655. Governor only to reprieve.

656. Proceeding when person under sentence of death may be incompetent.

657. Proceeding when person under sentence of death is pregnant.

658. Death penalty inflicted by lethal injection.

659. Facility.

660. Persons authorized to be present at execution.

661. Examination of convicted person's body and certificate.

662. Disposition of body.

§ 650. Warrant for execution of death sentence. 1. When a person is sentenced to the punishment of death, the justice or judge who presided at the sentencing proceeding, or if that justice or judge is unavailable for any reason, then any justice of the supreme court of the department in which the defendant was sentenced, must, within seven days, make out, sign and deliver to the sheriff of the county, a warrant directed to the commissioner or to the superintendent of an institution in the department designated by the commissioner. Such war-

rant shall state the conviction and sentence, appoint a week on which the sentence shall be executed, and command the commissioner to execute the sentence within that week. In counties within the city of New York, or in the county of Westchester, such warrant shall be made out as aforesaid, signed and delivered to the commissioner of correction of such city or county.

2. If the execution of the sentence shall be delayed while the conviction or sentence is being appealed, a justice or judge authorized to act pursuant to subdivision one of this section, at the conclusion of the state appellate process, if the conviction or sentence is not set aside, must, within seven days, make out, sign and deliver another warrant as provided in subdivision one of this section. If the execution of the sentence on the date appointed is delayed by any other cause, the justice or judge shall, as soon as such cause ceases to exist, make out, sign and deliver another warrant.

§ 651. Time of execution. The week of execution appointed in the warrant shall be not less than thirty days and not more than sixty days after the issuance of the warrant. The date of execution within said week shall be left to the discretion of the commissioner, but the date and hour of the execution shall be announced publicly no later than seven days prior to said execution.

§ 652. Delivery of warrant and confinement. 1. Within ten days after the issuance of a warrant as provided in section six hundred fifty of this article, the sheriff or the commissioner of correction, if within the city of New York or county of Westchester, must deliver the warrant and the person sentenced, if that person is not already in the custody of the department, to the department or to the superintendent of the state institution designated by the commissioner. Upon the issuance of the warrant the

court shall cause a copy to be personally delivered to the convicted person and shall send a copy of the warrant to the convicted person's last attorney of record.

2. From the time of the delivery of the warrant and until the imposition of the punishment of death upon the convicted person, unless discharged from the sentence, such person may, in the commissioner's discretion, either be kept isolated from the general prison population in a designated institution or confined as otherwise provided by law. The commissioner, in his discretion, may determine that the safety and security of the facility, or of the inmate population, or of the staff, or of the inmate, would not be jeopardized by the inmate's confinement within the general prison population.

3. The commissioner may promulgate rules and regulations concerning visitation of inmates sentenced to death. Such rules and regulations may provide that inmates sentenced to death are subject to different visitation policies and procedures than inmates who are not sentenced to death.

§ 653. Transmittal of record to the governor. Within a reasonable time following the issuance of the warrant as provided in section six hundred fifty of this article, the clerk of the court in the county in which the person was sentenced to death shall transmit to the governor a statement of conviction and sentence, and the transcripts of both the trial and the sentencing proceedings, including, to the extent practicable, any exhibits introduced therein.

§ 654. Governor may consult. The governor is authorized to request the opinion of the attorney general, the district attorney, and the convicted person's counsel, or

any of them, as to whether the execution of the person should be reprieved or suspended.

§ 655. Governor only to reprieve. No judge, court, or officer, other than the governor, can reprieve the execution of a person sentenced to death. This section does not apply to a stay authorized by law.

§ 656. Proceeding when person under sentence of death may be incompetent. 1. The state may not execute an inmate who is incompetent. An inmate is "incompetent" when, as a result of mental disease or defect, he lacks the mental capacity to understand the nature and effect of the death penalty and why it is to be carried out.

2. Upon the filing of a petition in the supreme court in either the county in which an inmate sentenced to death is confined or in the county in which the inmate was prosecuted alleging that the inmate is incompetent, the court shall issue an order staying the execution if and to the extent a stay is necessary to permit determination of the petition. Upon application of either the inmate's counsel or the district attorney the petition may be transferred to the court in which the inmate was convicted unless such transfer would be unduly burdensome or impracticable. Promptly upon filing the petition, the court shall appoint a commission of three psychiatric examiners, hereinafter referred to as "the psychiatric commissioners," to inquire into the inmate's competence and report to the court as to the inmate's competence. The psychiatric commissioners shall be impartial and must be qualified psychiatrists or certified psychologists. Before commencing an inquiry, the psychiatric commissioners must take the oath prescribed in rule forty-three hundred fifteen of the civil practice law and rules to be taken by referees. The petition may be filed

by the inmate, the inmate's counsel, an employee of the department, the inmate's legal guardian, a member of such inmate's immediate family or, in the event that the inmate does not have regular contact with a member of his or her immediate family, a bona fide friend who has maintained regular contact with the inmate. The petition must be accompanied by an affidavit of at least one qualified psychiatrist or certified psychologist who, based at least in part on personal examination, attests that in the psychiatrist's or psychologist's professional opinion the inmate is incompetent and lists the pertinent facts therefor. For purposes of this section the terms "qualified psychiatrist" and "certified psychologist" have the meaning set forth in section 730.10 of the criminal procedure law.

3. The petition shall be served upon either the district attorney who prosecuted the inmate or upon the district attorney for the county in which the inmate is confined. If the petition is served upon the district attorney for the county in which the inmate is confined, the court shall promptly notify the district attorney who prosecuted the inmate. Immediately upon appointing the psychiatric commissioners, the court shall direct that an examination of the convicted person promptly take place with all three of the psychiatric commissioners present at the same time. The court shall also direct, upon application of the inmate or the district attorney, that the inmate be examined by a qualified psychiatrist or certified psychologist designated by the inmate or the district attorney. Counsel for the inmate and the district attorney shall have the right to be present at each such examination. Upon the filing of a petition pursuant to subdivision two of this section, if the inmate does not have counsel and is financially unable to obtain counsel the

court shall appoint competent counsel experienced in the trial of criminal matters to represent the inmate.

4. The psychiatric commissioners must receive and consider evidence offered by the inmate's counsel and the district attorney, including written submissions, testimony and expert psychiatric evidence. The proceeding before the psychiatric commissioners shall be conducted on the record but need not be conducted in accordance with the rules governing the admission of evidence at trial, but counsel for the people and the inmate shall have the right to cross-examine witnesses.

5. When the proceeding before the psychiatric commissioners has been concluded, they must forthwith provide a transcript of the proceeding, together with their findings of fact, to the court with their opinion thereon. Unless impracticable, the psychiatric commissioners shall so act within sixty days from the filing of the petition. When an inmate shall be found incompetent by a majority of the psychiatric commissioners, the court shall accept such finding unless clearly erroneous, and promptly enter an order finding the inmate to be incompetent, staying the execution of the inmate and directing that the inmate be committed to a secure facility under the jurisdiction of the office of mental health if the inmate's incompetency is the result of mental illness. In all other cases, the inmate shall remain in the custody of the department. When an inmate is found competent by a majority of the psychiatric commissioners, the court shall accept such finding unless clearly erroneous, promptly enter an order finding the inmate to be competent and vacating any stay previously issued, and the court shall promptly inform the judge or justice who issued the warrant for the execution of the inmate of the court's finding. Upon being so informed, the judge or

justice shall promptly issue a new warrant in accordance with subdivision two of section six hundred fifty of this article. Any other provision of law notwithstanding, no other review, judicial or otherwise, shall be available with respect to an order finding the inmate to be incompetent or competent. If the court rejects the finding of a majority of the psychiatric commissioners on the ground that it is clearly erroneous, the court shall appoint another commission to proceed as provided in this section.

6. When an inmate has been committed to a secure facility pursuant to this section, the inmate shall remain there until the facility administrator determines that the inmate may be competent. Upon so determining, the facility administrator shall promptly notify the court that entered the order finding the inmate to be incompetent, and the court shall promptly notify counsel and the district attorneys and appoint another commission to proceed as provided in this section.

7. The court shall allow reasonable fees to the psychiatric commissioners. The court shall allow reasonable fees for time spent in court and for time reasonably expended out of court to counsel appointed pursuant to this section. The court shall allow all reasonably necessary costs, including without limitation the costs attendant to fees for the examination of the inmate by a qualified psychiatrist or certified psychologist, incurred by the inmate and the district attorney in connection with a petition pursuant to this section. Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source. All such fees and costs shall be a state

charge payable on vouchers approved by the court after audit by and on the warrant of the comptroller.

8. When a petition has previously been filed and determined pursuant to this section, the court in which a subsequent petition is filed or to which a subsequent petition is transferred, shall not issue an order staying the execution of the inmate unless the court finds, after notice to the district attorney who prosecuted the inmate and after affording the district attorney a reasonable opportunity to be heard in writing, that there is reasonable cause to believe that the inmate is incompetent; provided, however, that the court may issue an order staying the execution of the inmate, to the extent a stay is necessary to afford the district attorney an opportunity to be heard and such reasonable cause determination to be made.

§ 657. Proceeding when person under sentence of death is pregnant. 1. A sentence of death may not be carried out upon a woman while she is pregnant.

2. When the superintendent of the correctional facility where the inmate is confined is informed that reasonable grounds exist that a convicted person under sentence of death may be pregnant, the superintendent shall appoint a qualified physician to examine the convicted person and determine if she is pregnant.

3. Upon being informed by the superintendent that such convicted person is pregnant, the governor shall stay execution of the warrant to the extent necessary.

§ 658. Death penalty inflicted by lethal injection. The punishment of death shall be inflicted by lethal injection; that is, by the intravenous injection of a substance or substances in a lethal quantity into the body of a person convicted until such person is dead.

§ 659. Facility. The commissioner shall provide and maintain a suitable and efficient facility, enclosed from public view, within the confines of a designated correctional institution for the imposition of the punishment of death. That facility shall contain the apparatus and equipment necessary for the carrying out of executions by lethal injection.

§ 660. Persons authorized to be present at execution. 1. The commissioner, any persons designated by the commissioner to act as execution technicians or otherwise to assist in the execution, including correction officers, and a licensed physician or physicians may be present at the execution. The commissioner shall also select and invite the presence, by at least three days' prior notice, of a justice of the supreme court, the counsel for the convicted person, the district attorney and the sheriff of the county where the conviction was had, together with six adult citizens. The names of the execution technician or technicians shall never be disclosed, notwithstanding any other provision of law to the contrary, including article six of the public officers law. The names of the six adult citizens who witnessed the execution shall not be disclosed until after the execution.

2. The commissioner shall, at the request of the person sentenced to death, authorize and permit two clergymen to be present at the execution.

3. The inmate sentenced to death may name four relatives or bona fide friends to witness the execution, and the commissioner shall authorize said named relatives or friends of the inmate to witness the execution unless the commissioner determines that the presence of any named relative or friend at the execution would pose a threat to the safety or security of the designated correctional

institution. No person under eighteen years of age shall be permitted to witness any execution.

§ 661. Examination of convicted person's body and certificate. 1. Immediately after the execution an examination of the body of the convicted person shall be made by the licensed physicians present at the execution and their report in writing stating the nature of the examination and occurrence of death, so made by them, shall be annexed to the certificate provided for in subdivision two of this section and filed therewith.

2. The commissioner shall prepare and sign a certificate setting forth the time and place of the execution and stating that the execution was conducted in conformity to the sentence of the court and the provisions of this article. The commissioner shall cause the certificate to be filed, within ten days after the execution, with the office of clerk of the court in which the conviction was had.

3. The commissioner may appoint a deputy with the department to execute the warrant of execution and to perform all other duties imposed upon the commissioner under this article.

§ 662. Disposition of body. 1. Prior to the execution, the convicted person shall be given the opportunity to decide in writing to whom his or her body shall be delivered after the execution. The commissioner or his or her designee shall sign and authorize the convicted person's request if the request is not contrary to law. If the convicted person does not indicate to whom such person's body shall be delivered, or if the person's request is contrary to law, the commissioner may deliver the convicted person's body to a relative by blood or marriage or a bona fide friend. If the body is not claimed by a relative

or bona fide friend within seven days after execution, the body shall be delivered to a duly authorized and incorporated pathological and anatomical association in the state, if requested by an authorized association.

2. If the body of the convicted person is not claimed by a relative, bona fide friend, or a duly authorized and incorporated pathological and anatomical association, the commissioner shall cause the body to be disposed of in the same manner as are bodies of prisoners dying in the institution. Notwithstanding any other provision of law, no autopsy shall be required for the body of an inmate upon whom a sentence of death has been carried out.

§ 33. Subdivision 3 of section 112 of the correction law is REPEALED.

§ 34. The executive law is amended by adding a new section 63-d to read as follows:

§ 63-d. Attorney-general; death penalty prosecutions. 1. The attorney-general shall, whenever required by the governor or his designee after a request of the governor by a district attorney, direct that the resources and personnel of the department of law be used to provide assistance relating to the prosecution or appeal of any case where the defendant may be subject to the penalty of death. Such assistance shall include the use of any department resource or services, which the attorney-general deems proper, and may be performed or provided by the attorney-general or any employee of the department of law. Assistance pursuant to this section may only be provided with respect to proceedings where:

(i) the defendant is represented by counsel appointed pursuant to the provisions of section thirty-five-b of the

judiciary law or the defendant is receiving expert, investigative or other services pursuant to such section, or

(ii) the defendant, through counsel retained privately by the defendant through his or her own means or through the means of a person other than the defendant, or through representation by pro bono counsel, is able to marshal substantially greater legal and investigatory resources than those reasonably available to the district attorney.

2. A request of the governor made by a district attorney for assistance in a death penalty case shall be accompanied by a certificate of need stating that as a result of cases where the defendant may be subject to the penalty of death additional resources or personnel are needed to supplement the district attorney's staff and available resources in order to fulfill such district attorney's responsibilities.

§ 35. Section 837-a of the executive law is amended by adding a new subdivision 7 to read as follows:

7. Contract with an organization having substantial knowledge and experience in the prosecution of serious criminal matters for the development and provision of continuing legal education, training, advice and assistance for prosecutors in the prosecution of capital cases.

§ 36. The executive law is amended by adding a new section 837-l to read as follows:

§ 837-l. Capital prosecution extraordinary assistance program. There is hereby created within the division a capital prosecution extraordinary assistance program to be administered by the commissioner, to distribute funds to district attorneys for the prosecution of capital cases. Such funds shall be distributed where the commissioner

determines, on the basis of a written certification by the applicant district attorney, that due to the nature or number of capital cases being prosecuted by the district attorney a significant financial burden has resulted and financial assistance is necessary in order to fulfill such district attorney's responsibilities; provided, however, that such funds shall not be used to supplant existing resources. Such funds may also be distributed to a district attorney who, upon the request of another district attorney, has provided assistance in the prosecution of a capital case.

§ 37. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, part or provision thereof.

§ 38. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law and shall apply only to offenses committed on or after such date; offenses committed prior to such date shall be governed by the provisions of law in effect at the time the offense was committed; provided, further, however, that sections twenty-nine, thirty-five and thirty-six of this act shall take effect April 1, 1995.